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Legal Archaeology
Towards an Historical Grounding of Law Without Origin

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**Legal Archaeology: An Historical Grounding of Law without
Origin**

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Thesis submitted in fulfilment of the requirements of the degree of
Doctor of Philosophy

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Abstract

This thesis aims to reinstate Foucault's archaeological method for the purposes of legal theory. In defiance of its nearly universal criticism, I argue that the archaeological method maintains an overlooked capacity to provide a peculiar, *historical*, model of the "foundations" of law.

In critical legal circles, it is held that the law is radically *without* foundation: in deconstruction, law is the violent imposition of a decision that infinitely defers the coming of its own foundation; while the modern exercise of governmental power increasingly refuses association with a sovereign centre of authority as we shift into a "permanent state of exception". This thesis questions both the truth and desirability of these conclusions by drawing upon a theme that links the unfounded law of deconstruction to the absent law of governance; namely, their shared understanding of "law" as a function of history.

A study of the critical theory suggests that the unity and intelligibility of an order, the foundation and conservation of authority, inheres in a paradoxical relationship between past and future. In these theses, order may maintain itself by constantly pushing its fictitious origin into the past; or it may forcefully declare its future applicability. Each nomological moment therein takes the grammatical form of an 'historical a priori': a paradoxical motif which can, I argue, and in light of the fact that it subsists even in the most wholesale disavowal of a "Law of law", *have a legal life of its own*.

The 'historical a priori' in Foucault's archaeology exemplifies precisely this autonomous character. In defending it, and drawing upon it, I aim to show that conceptualising legal 'foundations' in this historical manner, without *origin*, can reinstate the strategic momentum that has been lost in the wholesale destruction of origins; all the while retaining fundamental critical-legal, anti-Platonic and post-Sovereign principles.

Introduction

Law Without Origins

This thesis situates itself in the midst of the critical disavowal of the search for the “Law of law,” a task which critical thought designates to the domain of “modern” legal philosophy with which it has made an irreparable break. With the demise of metaphysics, and unable to appeal to the *logos* of a divine entity, the modern task of legitimating power found itself caught between the will of the people and the exigencies involved in representing that will. The Rule of Law, as it was developed in the twentieth century, could provide the requisite stillness to the fluctuating process of power and representation only if it was possible to ground itself in a legal ‘science’ capable of reinstating the modern foundations of law in the absence of a divine *logos*. And so the emergence of modernity is accompanied among other things by the search for a positive legal “science”: one that would re-instate the foundations of law self-referentially, without appeal to the arbitrariness of its outside; unable to appeal to Truth but unwilling to appeal to power. These efforts to establish a ‘legal positivism’, while still dogmatically bound up with legal education and practice, are rejected in critical analyses of law and jurisprudence precisely for their secret ideological commitment to a certain form of politics¹; or in respect of their epistemological inadequacy, their persistent recourse to an equally secret ‘supplement’, whether in the transcendental consciousness or the immanence of social life.

The post-metaphysical “Law of law” is characterised in certain forms of critical thought by its fundamental “lack”, the void at its centre: this radical lack or void can be analysed, as ‘myth’ or in psychoanalysis, for its own law-like properties; or this arbitrary ‘law’ without origin may be construed as a necessary evil in a world without possible foundations (as in deconstruction). In older forms of critique, the law may fulfil an ideological function in covering over, by means of false foundations, the arbitrary exercise of power: in which case the critical task is to effect the wholesale destruction of a certain form of law (bourgeois or State law) in pursuance of a more fundamental truth (as with Marxism). There are numerous variations on the Marxist theme, and some, following Engels, continue to espouse the idea that the essence of law exceeds the ideological function given to it by capitalism, rendering it ‘relatively autonomous’. I shall leave these to the side, notwithstanding the proximity often cited between Althusser’s structuralism, for example, and Foucaultian interests.

¹ This is the insight of the CLS movement in particular. See, e.g., Hunt, Alan, “The Critique of Law: What is “Critical” about Critical Legal Theory?”, in Fitzpatrick and Hunt (eds), *Critical Legal Studies* (Oxford, Basil Blackwell) (1987), 5–19.

Finally, the rejection of the “Law of law” appears in the theological work of Giorgio Agamben, who deems the search for legal foundations to be a quest to establish a “glorious” “mythologeme”. This approach is not informed by the post-structuralist concern over the absence of *logos*, but with the ‘economic theological’ inscription of sovereign violence into governmental power in a permanent state of exception that now afflicts modern democracies. In this case, the groundlessness of law carries implications far more serious than the absence of justice: it establishes, in its coupling with power, the presence of the most dangerous and radical form of injustice. For Agamben it is in the interests of emancipating life from the stranglehold of sovereign power that we ought to abandon the search for a “Law of law” – indeed, such endeavours only serve to cover over the absence of law and the threat of exceptionalism at the heart of power. Just as the institutions and rituals of law and democracy conspire in a type of ‘ideology’ that Agamben claims is inherited from the theological function of ‘glory’, we might even suggest that modern legal theory explanatory of the foundations of law, and legal positivism in particular, constitutes a “glorious” intellectual ritual.

Instead of seeking out a “Law of law,” then, the alternative is either to move within a law that we cannot escape and in which we do not believe; or to find a way to go beyond the apparatuses of government that inscribe in themselves the vacancy of the law, in the hope that from this wholesale destruction there might spring, for the first time, a ‘form of life’. These are the sometimes despondent, sometimes fantastical, alternatives that present themselves to us by virtue of the absence of the *logos* which no legal science, no aspect of our humanity, can recover. This thesis is partly informed by the question over whether the abandonment of ‘origins’ or foundations of law ought to be so despondent or so wholesale; and I ask whether it is possible to seek out an alternative that might give us some purchase on new beginnings without demanding that we first move blindly, recklessly or violently into an abyss. I propose that we are given one such alternative in the method of ‘archaeology’, one that is still under-examined² in critical legal thought, and which requires the elaboration and expansion that shall be undertaken, or at least begun, in the course of this thesis; but which moreover suggests that there is good cause, both politically and philosophically, to re-institute an idea of the Law of law.

² It is necessary to distinguish the epistemological, jurisprudential task of this thesis from prior uses of archaeology in the context of the law, specifically in the discursive analysis of case law (see e.g. Threedy, D. “Unearthing Subversion with Legal Archaeology” 13 Tex. J. Women & L. 133 (2003-2004); Threedy, D. “Legal Archaeology: Excavating Cases, Reconstructing Context” 80 Tul. L. Rev. 1197 (2005-2006)); or in the formation of legal discourse and its connection to culture, politics and the creation of subjectivities (see, e.g., Novkov, J. “Legal Archaeology” Political Research Quarterly 64(2) 348-361 (2011); Drakopoulou, M. “Women’s Resolutions of Lawes Reconsidered: Epistemic Shifts and the Emergence of Feminist Legal Discourse.” Law and Critique (2000) 11: 47) Such uses of the method are doubtless fruitful; but one must nevertheless, in proceeding along these lines, reaffirm the logic whereby law secures its identity and autonomy (see also Chapter Two below): whereas the task of this thesis is to strike at the heart of the same.

On the Origins of Archaeology

The archaeological method brought forward in the thesis, and which is formulated by Foucault in what we might refer to as the ‘early phase’ of his work, finds its adumbrations in some notes on an essay concerning ‘the progress of metaphysics’ left unpublished by the elderly Kant, whose approach to the subject was to raise the question of the possible *philosophical* history of philosophy. For Kant, “archaeology” is said to be ‘the history of that which renders necessary a certain form of thought’³: this history can only be conducted according to *a priori* rationality – in accordance, that is, with a metaphysics which ‘lies wholly prefigured in the soul’. In contrast to this history informed by the transcendental *a priori*, all other philosophies are built, blindly, ‘upon the ruins of the last’⁴, and so they enjoy a sequential history that is nonetheless inadequate to an authentic philosophical account of the history of philosophy itself. Only an ideal history which proceeds from *a priori* principles may, in Kant’s thesis, achieve this goal. In short, the historical events of thought are understood for the first time from a new historical position, which is simultaneously detached from their truth and informed by a higher source of understanding in the ‘*a priori*’⁵.

Despite the fact that post-anthropocentric critique will depart radically from Kant and the transcendental *a priori*, two things are retained from this work in ensuing ‘archaeological’ efforts: the placing of oneself in a radical historical sphere in order to appraise a sequence of historical events; and the problem of accounting for the ‘origin’ of those historical events from that perspective – a task that entangles past and future in a grammatical complex of the ‘future anterior’. In order to raise the question of the Law of law, this thesis attempts to harness the force of that paradoxical ‘future anterior’, the nature of what ‘will have been’ that is the specific domain of the archivist who violently interprets history, in the present, for the purposes of the future; or of the archaeologist who grasps, from the moment of the present, the events of history ‘for the first time’, disrupting their sarcophagi, making them stir, forcing them towards the future and revealing, from a radical historical perspective, the contingency of their origins as so many ruins among others.

³ Foucault, M. “Monstrosities in Criticism”, *Diacritics* Vol. 1, No. 1 (Autumn 1971) pp 57-60.

⁴ I paraphrase a quotation taken from Kant’s *Logic* and cited in Agamben, G “Philosophical Archaeology,” in *The Signature of All Things* (2009) at 82: “every philosophical thinker builds his own work, so to speak, on the ruins... of another...”

⁵ Kant, I., “What real progress has metaphysics made in Germany since the time of Leibniz and Wolff?” in Allison, H and Heath, P. (eds) *Immanuel Kant: Theoretical Philosophy after 1781*, (Cambridge, 2002) p337 et seq.

Following Foucault, I suggest that archaeology can reveal, in the dimension of the future anterior or ‘historical a priori’, a form of necessity corresponding to all that may be seen and said seriously in a specific cultural and historical context⁶. This necessity takes up the task of providing the ‘Law of law’ of a system of acceptability, but this ‘Law of law’ will be avowedly ‘historical’ and so removed from the transcendent domain of the formal a priori. This renewed understanding of the Law of law *without origins* shall assume the designation, for reason of its location in the system of Foucault’s archaeology, ‘historical a priori’. It is my view that this ‘historical a priori’ may not only supplant the search for ‘origins’ of the law, but that it will also remedy the disavowal of a ‘Law of law’, understood very broadly in the formal transcendental sense. The historical a priori as a ‘Law of law’ is something beyond the will to power, which constitutes the content of ‘truth’ but does not account for the continued necessity of ‘being in the true’ pertinent to every exercise of power, every language and every community. This will set it apart from the deconstructionist annihilation of the Law of law together with ‘origins’ or ‘presence’. All the same this ‘truth’ does not find its own condition in any higher Truth or *logos*: the historical a priori is also something less than Truth. More than power but less than truth, it is instead a function of a certain form of history.

The Structure of the Thesis

The thesis proceeds in four stages: the first will demonstrate an already-defined gap among critical philosophical approaches to law in which Foucault’s archaeology may find a space for its legal adaptation. The second will address the problem of the form of legal archaeology, bringing it into line with a specific version of legal positivism, of which it shall nevertheless be an adaptation. The third will defend that form of legal positivism against the perceived displacement of the archaeological method in Foucault’s oeuvre with the concern for power that took priority for the latter in the wake of the *Archaeology of Knowledge*. Finally, I will attempt to demonstrate possible ways in which Foucault’s method, co-opted into the legal lexicon, may be applied to problems both of legal institutions as we ‘find’ them, and of the Foucaultian problem of biopolitical governance. A word of caution is necessary at the outset: for while there exists a reasonably healthy volume of literature dedicated to the subject of “Foucault’s Law” or “Foucault and law”, and while I have made some use of these theses in discussing the threats to legal archaeology from power (in Chapter Three), I do not wish to join their ranks. Instead, this

⁶ The connection between this “necessity” cited by Foucault and the historical a priori of his archaeology is proposed by Colin McQuillan in McQuillan, C. “Philosophical Archaeology in Kant, Foucault, and Agamben,” *Parrhesia* No. 10 (2010), pp 39-49 (see also my discussion of this piece in Chapter 1 below).

thesis should be construed as an investigation into method, one which situates itself partly within the epistemology of law, and partly within the philosophy of history – just as Foucault’s own enterprise spanned history, philosophy and, unwittingly, Critical Theory: a “true monstrosity” of a work the parameters of which are under scrutiny yet.

This is perhaps why I have found that the *Archaeology of Knowledge* is happiest in the company of certain forms of systemic legal positivism⁷: not only because, while reading the book, one is struck by its structural parity with these theses – for all its references to rules of formation, their transformation into regularities, their systemic dependency; but also by connivance of the secondary literature that, without hint of legal inclination, does not hesitate to systematise the systems of discourse that are its object into ‘primary’ and ‘secondary’ rules. But also because legal positivism – now understanding itself as a ‘science’, now as a ‘normative theory,’ and occasionally lost for words – is similarly monstrous. A congenial pairing of two monstrosities, then, in which one might help the other to tread a little more assuredly in the world.

Chapter One orients the thesis in two pre-existing tropes of law-and-philosophy which bring to the fore questions of the ‘archive’ and of ‘archaeology’. I begin by reading, and thus bringing to legal attention, Derrida’s *Mal d’Archive* – an obscure piece of Derridean literature, especially among lawyers – in which law and the concept of the ‘archive’ are submitted to the gaze of deconstruction in the context of psychoanalysis. Derrida describes the etymological and historical co-dependency of legal authority and the concept and substrate of the archive, and through a demonstration of its *hypomnemic* (legally-recollective, but also quasi-oratorical) significance for the Ancients, draws a line of continuity between “archivalisation”, the inscription of memory, and the Freudian death drive. The interplay of legal authority and memory is drawn out in the same deconstructive language as we found when Derrida spoke more obviously about ‘law’ (he is at pains, however, to express the legal significance of the ‘archive’, too) in *Force of Law*⁸. The civilising command of memory confronts the destructive death drive, which is also a compulsion to forgetfulness, producing an ‘archival desire’ or ‘archive fever’, in which one compulsively institutes and destroys memory onto a *hypomnemic* substrate, just as one iteratively destroys and constitutes the law in its own peculiar textuality. Of significance in this treatise is

⁷ In an unpublished piece, an attempt has been made to draw a connection between the archaeological method and a commitment to the alleged insight of a different facet of legal positivism – in which the law is said to take the form of the command or the ‘Word’. This piece seems to situate itself in the tradition of archaeologies of law (see n. 2 supra) and its author insists upon avoiding the ‘regress’ of systemic legal positivism in an apparent effort to evade the ontological law-question. I fear, however, that this is merely to circumvent that question by deferral. See Makela, F. “Outline of a Foucaultian Archaeology of Law.” (unpublished, SSRN 2009)

⁸ Derrida, J. “Force of Law: the Mystical Foundation of Authority.” 11 Cardozo L. Rev. 920 1989-1990

Derrida's ban on archaeology: he chastises Freud's psychoanalysis for believing that there was such thing as an 'origin' or a 'memory' that could be archaeologically brought to light, putting an end to the desirous process of archivalisation. Deconstruction, of course, does not admit of any going 'outside' – of the law, of the text, or of the archive. With Derrida, Foucault is also suspicious of the 'metaphysics of presence' and in much earlier years relinquished the phenomenological call to the analysis of the lived experience – partly owing to Derrida's devastating critique of what is now *The History of Madness*⁹. In the later archaeology, however, he treads much more carefully.

Archaeology as a regressive practice is reinstated, however, in Agamben's *Philosophical Archaeology*, a treatise on the emancipatory methodology belonging to his larger oeuvre. I demonstrate the significance of this 'archaeology' for Agamben's project (for it is not expressly stated in the piece) in order to show its political significance in light of the understanding of 'history' and 'law' upon which it is brought to bear. The structure of the biopolitical sovereign exception falls under a wider methodological category of inclusive-exclusion that pertains not only to law, but also to language and history. The methodological performance of archaeology is, in Agamben's view, the sole practice capable of overcoming the zones of indistinction upon which these processes of inclusive-exclusion are entrenched. Archaeology allows us to go 'beyond' law, and history, 'for the first time' – in Agamben's sense of the word, 'archaeology' coincides with a form of 'messianism' understood as 'inoperativity', which is to be distinguished from Derrida's 'messianic' justice-to-come. Both attitudes towards 'archive' and 'archaeology' share in the search for justice, either 'to come' or 'to be fulfilled'. The later expansion of Foucault's archaeology will not coincide with the same search for justice – as a form of positivism, it will take the systemic conditions of the law seriously in their own right, and it will not even suggest that a political strategy of peace or liberal freedom is satisfied in its insistence. This is a first critical delimitation of any possible legal archaeology: but it serves, I hope, to lessen the burden on law and the thinking of politics, construing this relationship into something more manageable, too. For deconstruction as an 'iterative' operation allows for strategies of 'irritation' within the law, and ceaselessly requires that politics enshroud itself in the violence of law. But it is the auspices of a legal archaeological method that some more concrete form of 'confrontation' against the law can be brought about, at least within the purview of theory. And yet it will avoid, as an historical method, the charge of creating itself anew; it will have no self-evident constitutional efficacy, for that matter – but it will perhaps allow for a legally-oriented practice of 'thinking and being otherwise' that has hitherto missed the mark in ostensibly 'Derridean' theses

⁹ See, e.g., Boyne, R. *Foucault and Derrida: The Other Side of Reason* (London, Routledge) (1996).

concerning law's constitutive 'openness' or 'responsiveness' (we will encounter one such thesis, apropos to the study of Foucault's Law, in Chapter Three) for precisely the epistemological reasons that a legal archaeology seeks to resolve.

Bringing together Agamben's thesis and Derrida's *Archive Fever*, and in spite of the mutual prohibitions one sets upon the other, I will claim to find a location in which a legal archaeology, in Foucault's sense, can emerge. The Derridean archive and Agamben's archaeology both share in a common understanding of 'law' in one respect: they find its essence in a tension between two sides of a grammatical form, the future anterior. In fact, this form shares precisely the structure of the 'empty signifier' that characterises post-structuralism, and which founds the basis on which the rejection of 'origins' has also become a critical legal priority. In his essay on the *Theory of the Signature*, Agamben draws together his own understanding of the 'signature' (the inscription of sacrality that accompanies the bare life caught in the zone of indistinction) and Derrida's textual 'signature' – both of which reflect their own futural-anterior versions of the empty signifier. But he also brings Foucault's theory of the statement into this scene, creating a third in a triangle wherein each thinker shares a concern for archive, archaeology – or both – and yet in which one remains conspicuously absent from the theorisation of law. Further, the grammatical form of the 'future anterior' coincides with a temporal dispersion of the form of law. Might the 'historical *a priori*' at work at the centre of Foucault's archaeology, and which 'represents' the systemic reduction of a discursive unity, also be understood in the context of this grammatical form? Especially since Agamben has already attempted to bring it into line with his own lexical position on the 'future anterior' in which the law finds its messianic fulfilment. It is a concept in need of a theory, of course – but this may be said (it has been said) of a certain form of legal positivism, too. Finally, Foucault's theory of the statement will share, at least in its Deleuzian version (in Chapter Three), in the *ana-logos* depiction of sensible and visible forms engendered in Derrida's description of the textual sphere. The stakes are high, and problematic: a post-structural methodology that attempts to find 'law' where it was nowhere to be found; that is unconcerned for the ethics and justice that usually rush to the fore, that usually *prompt*, postmodern theses that abandon the metaphysics of presence; and that tries to hold *itself* up under the weight of the later work of its own original author. In this Chapter, however, I hope to have shown that the gap in the literature is actually something of a welcoming space carved out in advance for the theory, already at home among neighbours.

In Chapter Two, I try to demonstrate the legal form of the archaeological method. But this is by way not of a direct application of archaeology to law; rather it is sought through a threefold

motion that draws archaeology, a particular branch of ‘systemic’ legal positivism, and the human sciences, together. The human sciences are instrumental in this narrative not only because it is these very recent “sciences of man” with which the archaeology is concerned in the main, but also owing to their close relationship both to the archaeological method itself, and, I argue, to legal positivism. In the first instance, I try to develop, while explaining and contextualising the relevant parts of Foucault’s work in light of the problem, an argument that posits the task of ‘developing’ a legal science alongside both the epistemological *function* and internal *structure* of the human sciences. Foucault explains in the *Order of Things* the function of the human sciences in light of the emergence of the figure of Man: as the Classical age and the episteme of ‘representation’ that allowed words and things their adequacy drew to a close, Man as the source and also the subject of knowledge encountered a radical disjuncture of words and things and the loss of the form of ‘representation’ that had hitherto sutured the now separate pursuits of positive science and philosophy. The human sciences filled in the gap left by that representation, providing an area of ‘dubious’ science in which Man could represent, through a complex structure of conscious systemic behaviour and unconscious signification, his own delimitations to himself, and these could be revealed through a form of science that could bring them to knowledge. I will suggest that in the breakdown of the adequacy of sovereign right and political power, the ‘law’ itself emerged in modernity, and that it is among other things a fairly recent phenomenon. And I will attempt to show that systemic legal positivism follows the same pseudo-scientific manoeuvres as the human sciences, and for the same representational reasons – in the context, that is, of representing Man’s (political) limitations to himself by theorising a connection that replaces sovereign ‘right’ with the representational substitute of ‘validity’.

For the purposes of this Chapter, I am using only a limited range of the spectrum of legal positivism – H.L.A. Hart and Hans Kelsen are the sole examples put forward for these purposes. This is owing, however, first to their importance in the study of jurisprudence in UK legal systems, but secondly to their capacity to represent, in different ways, a certain ‘systemic’ form of positivism that is not associated (or not directly associated) with avowedly ‘sociological’ forms of positivism that will already find themselves situated squarely within the purview of the human sciences (of which sociology is a paradigmatic case)¹⁰. This would be to compound the question. I concede, however, that the theorists I use are merely illustrative of the historical and epistemological problem in hand, and not representative of the entirety of legal positivism. With

¹⁰ In a different line of inquiry, Roger Cotterrell has suggested that the archaeological method could be of use in examining the relationship between legal science and sociology, each understood as a discrete scientific discourse that affects the other. This is perhaps a gainful meta-epistemological use of the method, but it is not being directed *internally* at the epistemological question in legal science. See Cotterrell, R. B. M. “Law and Sociology: Notes on the Constitution and Confrontations of Disciplines.” *Journal of Law and Society*, Vol. 13, No. 1 (Spring, 1986) pp9-34

this said, it is also necessary to denote that one of the three problematic aspects of the thesis is also engaged at the same time: defending archaeology from its critics. And this precisely in the context of the human sciences: I draw upon an almost universally authoritative reading of Foucault's work by Dreyfus and Rabinow, in which the archaeology is resoundingly diminished, and not least for its capitulation, in the eyes of the authors, both to the problem of Man which the *Order of Things* was designed to subject to an epistemic containment, and to the very form of the 'human sciences' themselves. The battle is waged on two fronts, then: legal positivism of the type I am discussing *is* a human science, even though it is not aware of it; and archaeology is *not* a human science, even though the charge has been made against it. The deciding factor, as I try to explain, is 'power'. The positivist legal sciences are always defeated in the last instance by the re-emergence of the power that they try to contain: whether in the nuance of the 'act of will' pertaining to the norm in Kelsen's late theory; or at the final 'apotheosis' of the system of rules, in light of which Peter Fitzpatrick has waged a sustained polemic against Hart. I side with these theses without further argumentation – again, they are illustrative – but far more could be said, I fear, in their favour than against them. In any case they support the theory, which stands independently of them, of the connection between the historical cause for the human sciences and of the emergence of law with Man – namely the universal collapse of metaphysics, in thought, in science, and also (Foucault does not have to tell us: we have monuments of our own) in politics.

It remains, then, to superimpose the form of legal positivism onto the form of the archaeological method – and vice versa. But this is not to be construed solely as the work of analogy. For in defending archaeology against the charge of the human sciences, I have freed it up, I think, for another function – of resolving the issue of bringing power and legitimacy into correspondence with each other, something legal positivism was not quite able to do. In order to do this, however, it is necessary to change our understanding of what directs behaviour as such, the legal norm, to what presides over acceptable thought and action in the context of discourses that inform power. The norm is therefore substituted for the 'statement' which lies at the heart of the archaeological method and which may be considered as a 'serious speech act'. I describe the systemic co-dependency of statements and the systems of discursive formation to which they belong, finding that there is no apex to this structure, but instead the archaeological motif of the historical *a priori*. The historical *a priori* is not an easy concept and I am obliged to defend it, especially in light of the methodological use to which I wish to put it, against its frequent reduction to a formal *a priori*. It is to this ambivalent concept that I attach the newfound replacement for the "Law of law": it is not, I argue, the transcendental figure of the 'origin' or

logos, but instead a function brought about by the historical method that carves out historical frames of discursive unity in a quasi-epistemological manoeuvre that also renders these formations and the statements of which they are comprised in a state of constitutive flux. This is not, however, a problematic co-dependency: rather it is a necessary methodological manoeuvre in order to systematise the unity of modes of representing forceful utterances or significant statements – the figure of the ‘empty signifier’, by virtue of which ‘to speak is to *do* something,’ returns insofar as social and cultural contexts are capable of being divided up according to the lifespan of their systems of acceptability. In other words, there ‘was a time’ when it was acceptable to prescribe Valium under circumstances that would not warrant any such prescription in medical practices today; or to detain prisoners without trial, without recourse to the language of rights. The social is carved up out of these historical unities of discourse; and it is in this context that the force of the ‘empty signifier’ finds its third legal home.

By this juncture, it is incumbent to denote that the location of ‘law’ has shifted from the locus in which it is ordinarily found, bound up with the State, its institutions and its violence – and that it now fits into the Foucaultian place left for ‘knowledge’, and brings it squarely in line with the dispersed sovereignty that we find articulated through governmental apparatuses in Agamben’s thesis. Is this not simply a tautology of Foucaultianisms, to say that knowledge informs governmental power (we know that it does, in Foucaultian terms anyway)? Are we not proceeding close to Agamben, only to say something far less interesting? And in any case, are Agamben’s concerns, in light of which he chases the “Law of law” out of the permanent exceptionalism of biopolitical governance not remarkably formidable? Perhaps these remarks have various degrees of purchase. But my point is historico-epistemological, rather than political or ethical – albeit that it may be deployed, one day (I sincerely hope), towards the ends of radical politics. It is the proof of the thesis, having established the space for archaeology and demonstrated its legal form over the course of the previous two chapters, to show that the dimension of history – of this *type* of history in particular – *adds something* to the study of law. And this is not self-evident from the surface of Foucault’s texts. But it can be construed from them without damaging the latter too extensively.

In Chapter Three, then, I bring archaeology into view of everything that threatens its legal significance. I expose it to the onslaught of ‘power’ in the work of Foucault that threatened to diminish archaeology, and in light of which the “historical *a priori*” as the “Law of law” threatens to be reduced to the incidence of power that would explain it away. I argue that Foucault’s specific understanding of Nietzsche was one in which knowledge, in the context of

the will to know, was never to be totally diminished by the will to power – that there is a necessary ‘overhang’ of knowledge, of ‘empty rules’ and an indelible presence of ‘systems of acceptability’ that coincide with the circulation of power but cannot be reduced to the latter. There is a continuity, then, of archaeology. Secondly, I draw from two of the least ‘reductive’ readings of “Foucault’s law” or “Foucault and law” that provide certain indications as to the ways in which the understanding of the historical *a priori*, given its position in a field of archaeological objects that seep into these particular presentations of “law” in Foucault, is a “Law of law” proper – in a way that protects the method from being a simple tautological re-statement of Foucault’s thesis. But something extra is needed, over and above these shared elements.

It is here that I tentatively suggest that the ‘peculiar ontology’ enjoyed by the overhanging aspect of knowledge has the potential of lending the historical *a priori* an ontology of its own. It is necessary – since the aim is not to capitulate to a theory of ‘origins’, and because Foucaultian archaeology would disbar any possibility of referring to a ‘law object’ (a continuous epistemological object that is determined in advance) – to distinguish this ontology from the ‘law object’ that would run the course of a history of power (as Panu Minkkinen suggests). However, the possibility exists of bringing the historical *a priori* to bear on Deleuze’s theory of the simulacrum. By positioning the historical *a priori* not only at the foundation of the historical unity of a system of acceptability, but also alongside other such unities in a system of simulacra, it is possible, I argue, to conduct a malicious form of history, one that imitates the form of the law engendered in legal modernity by showing it its falsifiable historical form, counterfeiting the ideal form of law and bringing it into a sequential relationship with other historical unities among which it is degraded.

In the final Chapter, I ask whether we might use this legal archaeology in the context of Rancière’s dissensus insofar as the latter shares in the Sophism of the ‘systems of acceptability’ that are unified under the rubric of the historical *a priori*. In an essay concerning the subject of the rights of Man, Rancière seizes upon Agamben’s *zoe/bios* distinction in order to reject it as a ‘depoliticisation’, opposing to its tortious opposition his own politics of dissensus. Dissensus is problematic, however, if we are to bring these rights to bear upon law itself. Rancière’s theory of the distribution of the sensible allows that surplus rights of the ‘part of no part’ can be disruptively demonstrated in the political sphere as the politics of aesthetics ‘places one world within the next’. But the formidable strictures of the legal form – demonstrated, for example, in certain systems-theoretic accounts of law – disbars the placing of another world in the space of the law. Nevertheless, I ask whether there is scope for ‘placing one world within another’ in the

context of law simply as a matter of doing legal history; or even whether we may use the method to think Agamben's position in relation to biopolitics anew, recasting the relationship of the *bios/zoe* distinction of which Rancière has been so critical.

Chapter One

Philosophical Encounters between Archive, Archaeology and Law in Derrida and Agamben

In this chapter, I will discuss two occasions in which the concept of the ‘archive’ and the method of ‘archaeology’ respectively have been brought to bear on *law*, if not directly upon legal theory. In the first instance, I will read Derrida’s *Mal d’Archive*, a little-discussed piece among legal theorists that was originally given as a lecture in 1994 at the Freud Museum in London to an audience comprising psychoanalysts and archival scientists – few, if any, lawyers. And yet, in this piece, Derrida expounds the legal significance of the archive, and allows for a connection between the nature and significance of the ‘archive’ and the textuality of law; between the *mal d’archive* or archive fever and the call to justice. In particular, the civilising force of the law against the forgetfulness of the Freudian ‘death drive’ is shown to be productive both of the inscription of the archive and the compulsion to make that inscription; in a way that allows us to go beyond the Derridean texts that pertain to legal theory – those concerning only justice or the constitutional moment – we might understand, in reading *Mal d’Archive*, the entirety of the formal law as a response to the call of civilising justice; spreading the legal problem of deconstruction into the every intellectual moment, every archive of a culture. But as with all deconstruction, there are snares and prohibitions in this textuality: we respond compulsively to a call to civilisation, we create and proliferate the archives of our law; but we may never destroy the archive without creating it afresh; we may never create an archive without some destructive violence. The ‘archive fever’ constitutes, like desire in the Freudian lexicon, an iterative compulsion; but unlike in psychoanalysis, for which the experience of a trauma could be revealed in its purity, the deconstructive eschewal of ‘origins’ and ‘presence’ forbids any movement beyond this iteration. It forbids, in Derrida’s words, any ‘archaeology’ that pretends to encounter such presence; on the same grounds that Derrida had always opposed archaeology – as another instance of history, of reason, and therefore of archivisation. The *mal d’archive* is an iterative compulsion of law-towards-justice without, in Derrida’s understanding, any cure.

To Derrida’s pessimistic and iterative reading of Freud I contrast a short essay by Agamben entitled *Philosophical Archaeology*. Like Derrida, Agamben takes up the question of memory and forgetting, extending its significance to history, language and law. As with archival deconstruction we may associate these questions with the problem of the “Law of law”, for Agamben’s archaeology is intended, above all else, to overcome the permanent state of exception

that forms the object of his *oeuvre* writ large: the archaeological method is put forward as the *only* means of getting beyond the bipolar articulation of consciousness and the unconscious, memory and forgetting, history and prehistory and therefore, by extension, bare life and political life, *zoe* and *bios*. Archaeology proceeds by encountering these heterogeneous elements and bringing them to their point of indistinction in a cessation of the operation of sovereign withdrawal and exception that characterises their constitutive *difference*, the exclusion of one in the service of the other. For Agamben, the archaeological method is not only *possible*, but it is capable of delivering the regressive moment that Derrida denied to psychoanalysis. As one might expect, however, this ‘regression’ takes a very different form, falling in line with a ‘messianism’, a call to justice that echoes, and yet is distinguishable from, the call to justice, and to civilisation, that incurs for Derrida the iterative process of archivisation. This distinction allows us to move “beyond” the present law, beyond history and even memory, and allows at least for the *possibility* of encountering a perfection of law and justice by rendering the former ‘inoperative’ – which is to say, by redeeming its lost potentiality.

At this stage, let us note that the political strategy of deconstruction offers a less than radical prospect of ‘irritation’ of the law. But the messianic inoperativity projected by Agamben remains hard to conceptualise, and seems to defy the need for language and reason in political action – which is to suggest that we cannot render *everything* ‘inoperative’; that there must be some adumbration of heterogeneity, of memory and forgetfulness, inherent even in this incredibly radical politics. The curious nature of ‘inoperativity’ and the relative pessimism of deconstruction aside, I will show that the treatment of the question of law-as-archive and archaeology-as-justice in these respective theses occasions an unjustifiable omission of the link between Foucaultian archaeology and law; one which would allow for a thinking of law in a manner that straddles the historical demands of archival iteration and ‘going beyond’ the present law. Having shown that archive and archaeology enlist a ‘future anteriority’ in the very nature of the law; and that this ‘future anteriority’ is the form that law must take if we are to rescue the same from the Idea of ‘origins’, I conclude by suggesting that an alternative understanding of this ‘future anteriority’ is possible in Foucaultian archaeology. Might we not find some use this *last and uncounted* formulation of archive-archaeology-law in the service of legal theory?

Archive without Archaeology: Derrida’s *Mal d’Archive*

The objective of the 1994 lecture was to present, first, the problem of psychoanalysis: to deconstruct a science that sought out the original event or trauma that was thought to be

retained in the unconscious; to make that trauma ‘speak’, to find a cure for the analysand and an originary *object* in memory for the psychoanalytic science. Approaching this problem from the perspective of deconstruction, Derrida sets out, in a number of disjointed ‘beginnings’¹¹ a lengthy prolegomena: on the historical use and significance of ‘archives’, the structure and dynamic of the archive, and the possibility – assisted by a lengthy discussion of a work by Harold Yerushalmi – of performing a history – a psychoanalysis – *of* psychoanalysis, finding in its origin a link to Moses, to the law of the Father, and to Judaism. Derrida sets out to apprehend the science of psychoanalysis in the true philosophy of deconstruction; arguing that every effort to uncover latent memory or original experience is itself a re-capturing of that memory for its further entrenchment, in a moment that projects it, authoritatively, towards a *future* use. Thus, psychoanalysis is not a neutral or disinterested search for origins; it is the performance of a *compulsion* towards remembering – a compulsion that is identical to the repetition impulse of the traumatic illnesses that Freud occasioned to ‘cure’. From the vantage point of deconstruction, every psychoanalysis compulsively searches for an origin that it cannot finally reach: every disclosure of a perceived origin – an original trauma, or an event – is in fact the construction of a new memory, for the first time. Like the processes of judgement and of declaration, psychoanalysis is the function of a dialectical law-preserving and law-conserving violence; its object is not the irresistible call of judgement, but the irresistible desire for memory. To what extent, we might ask, does the need to do justice, the need to say “We the People”¹², correspond to this *desire* to remember? I will detail the nature and iterative function of the archive before expanding the content of Derrida’s lecture (addressed to psychoanalysts and archival scientists and therefore self-abnegating in its discussion of ‘politics’) towards the question of the inextricable link between law and memory, a link which will depend upon precisely this ‘legal’ relationship between violence and the compulsion to arrest the same.

Hypomnēsis

The nascent science of psychoanalysis blurred the distinction between memory and its exterior by describing the psychic apparatus as an ‘economy’ between the conscious perception of events and the unconscious ‘storage’ of these events in a latent substratum from which they may resurface at a moment in the future. Derrida states the “archival” turn in psychoanalysis thus:

¹¹ In customary fashion, Derrida cannot help but defer the origin of the lecture, and as a result there are several *beginnings* – an unmarked beginning, an ‘exergue’, a ‘foreward’ and a ‘preamble’.

¹² See Derrida, J. “Declarations of Independence.” (1986) *New Political Science*, 7:1, 7-15

“Freud made possible the idea of an archive properly speaking, of a hypomnesic or technical archive, of the substrate or the subjectile (material or virtual) which, in what is already a psychic *spacing*, cannot be reduced to memory: neither to memory as conscious reserve, nor to memory as remembrance, as act of recalling. The psychic archive comes neither under *mnēmē* nor under *anamnēsis*.”¹³

Neither *mnēmē* nor *anamnēsis*: we are not dealing here with the vital activities of remembering or ‘unforgetting’, but rather with *hypomnēsis*, a word that straddles two concepts, remembering and writing – what we might more comfortably bring together in the term ‘record’. This concept holds particular importance for deconstruction insofar as it brings into view the association of memory with textuality.

Seasoned readers of Derrida will know the importance of *hypomnēsis* in the greater scope of deconstruction: its ancient deployment can be found in the *Phaedrus*, in which Socrates discusses with his student the ‘inferior’ nature of writing as opposed to speech. Socrates recounts to Phaedrus the fable of the Egyptian god of writing, Theuth; who offers the King Thamus a number of inventions, among which the function of writing is promoted as “an accomplishment...which will improve both the wisdom and the memory of the Egyptians”¹⁴. Thamus’ reply, however, is retributive:

“What you have discovered is a receipt for recollection [*hypomnēsis*], not for memory. And as for wisdom, your pupils will have the reputation for it without the reality: they will receive a quantity of information without proper instruction, and in consequence be thought very knowledgeable when they are for the most part quite ignorant”¹⁵

Here, the link is made, in the word ‘hypomnesis’, between writing and “false memory” or “recollection”. In the fable of Theuth, they are one and the same; *mutatis mutandis* for Plato. And so, in *Plato’s Pharmacy*, Derrida analyses what is problematic about writing in the *Phaedrus* – namely, that writing, *hypomnēsis*, is a force that interferes with nature; as such, it is a *pharmakon*, which can signify either ‘poison’ or ‘cure’ (such is the connection we find in deconstruction between violence and writing; and between writing and ethics):

“In disturbing the natural progress of the illness, the *pharmakon* is thus the enemy of the living in general, whether healthy or sick. One must bear this in mind, and Plato invites us to do so, when writing is

¹³ Derrida, *Archive Fever: A Freudian Impression*, (1998) (University of Chicago Press), 91.

¹⁴ Plato (trans. Hamilton, W) *Phaedrus and the Seventh and Eighth Letters*, (1973) (Harmondsworth, Penguin), 96.

¹⁵ Ibid.

proposed as a *pharmakon*. Contrary to life, writing – or, if you will, the *pharmakon* – can only *displace* or *aggravate* the ill. Such will be, in its logical outlines, the objection the King raises to writing: under the pretext of supplementing memory, writing makes one even more forgetful; far from increasing knowledge, it diminishes it. Writing does not answer the need of memory, it aims to the side, does not reinforce the *mnēmē*, but only *hypomnēsis*.¹⁶

To this is contrasted the unmediated power of speech: it is not simply that speech can be more compelling or forceful; but that it produces a content that must necessarily emanate from ‘within’ – a true memory, rather than recollection. And thus speaking is also the guarantee of ‘true wisdom’ that cannot be fabricated or concealed. This ‘pharmaceutical force’ is, for Plato, the difference between speaking and writing. Against the Sophist, who ‘sells the signs and insignia of science: not memory itself (*mnēmē*), only monuments (*hypomnēmata*), inventories, archives...’¹⁷, the Socratic philosopher will speak “from the heart”. Thus, Platonism will argue against the suspicious prosthesis of writing in favour of speech, of the uninterrupted representation of memory; it will attack “the substitution of the mnemonic device for live memory, of the prosthesis for the organ” and, in doing so, Platonism will thereby institute a “boundary (between inside and outside, living and non-living)”¹⁸; in which the “living” is the domain of memory and the non-living is the domain of the prosthesis – of writing and precarious recollection.

“The “outside” does not begin at the point where what we now call the psychic and the physical meet, but at the point where the *mnēmē*, instead of being present to itself in its life as a movement of truth, is supplanted by the archive, evicted by a sign of re-memoration or of com-memoration. The space of writing, space *as* writing, is opened up in the violent movement of this surrogation, in the difference between *mnēmē*, and *hypomnēsis*. The outside is already *within* the work of memory.”¹⁹

The supplementation of the living memory by writing, therefore, is at the root of untruth and bad morality – that is, it legislates for the possible, undecidable and deceitfully sophistic obfuscation of genuine knowledge and the goodness of life, of the uninterrupted path between living and *logos*. The Platonic diatribe against sophism is roughly thus: in the sophist’s speech or writing, because it entails an economy of representation alone, there is no inclusion of Being itself. Because everything is equal in an economy of exterior representations; because every

¹⁶ Derrida, *Dissemination*, trans. B. Johnson (1981) (Athlone Press London), 100.

¹⁷ Ibid., 107.

¹⁸ Ibid., 108.

¹⁹ Ibid., 109.

representation has the same value as non-Being, these representations become interchangeable, and this opens the way for an infinity of supplement and substitution. Writing is thus an *exteriority*, a ‘dangerous supplement’ on the outside of the truth and goodness of living (no matter how ill this living might be); it has relinquished its connection to Being or *logos*. And while he knows that memory is finite, that it is coexistent with the life of the speaker, in deference to this ideal connection between the living speech and the *logos*, “what Plato dreams of is a memory with no sign. That is, with no supplement. A *mnēmē* with no *hypomnēsis*, no *pharmakon*”²⁰.

The deconstructive endgame plays out in *Plato’s Pharmacy* when Derrida asks why Socrates, ‘he who does not write,’ is not also considered to be a *pharmakeus*. Socrates’ own ‘bewitching’ power, his movement ‘like the flat stingray that one meets in the sea’ which ‘numbs him’ who it touches, and his final arrest as a heretic, ‘as a wizard’ – all this “ceaselessly refers the socratic *pharmakon* to the sophistic *pharmakon*”, conflating the two²¹. In the course of his work on the relationship between Foucault and Derrida, Rob Boyne establishes the significance of this endgame for Derrida’s critique of the ‘metaphysics of presence’²². The critique of metaphysics is the abandonment of the idea that there is a true origin behind words or signs, that there is any such thing as a true or perfect representation. It attests that all representation is equivalent in its truth since all first principles are inaccessible, that they are posited as a myth against which truth is measured and towards which the progression of knowledge is supposed to advance. This myth of first principles did not die out with the Kantian revolution: Western philosophy continues to concoct this myth of the origin, be it in transcendental consciousness (Husserlian ‘presence’ is Boyne’s concern here) or, one might suggest, the ineluctability of ‘reason’. Deconstruction, which maintains this lack of origin, is content to work through the sphere of representation, and does not exempt itself from the same. To encounter a signifier is not to behold its signification: it is to become *embroiled* in an act of signing that is already underway and that can never, in the absence of *logos*, find fulfilment. All writing and speaking dwells within this radical lack, in this infinite process of re-signification. The listlessness of deconstruction, then, lies in its acceptance of this fact. But the obstinacy of modern “metaphysicians”, and Derrida counts Freud among them²³, is to continue in the vain pursuit of the mythical *logos*, of the first principles of God or of nature, of the perfection of the *physis* and the relinquishing of the *nomos*.

And so, in *Freud and the Scene of Writing*, Derrida refers once again to the Platonic significance of *hypomnēsis*, this time in the context of Freud’s treatment of the link between

²⁰ Ibid.

²¹ Ibid., 118–19.

²² Boyne, *Foucault and Derrida*, 97.

²³ Eg, “Freud and the Scene of Writing”, in Derrida, J. *Writing and Difference*, (2001) (Abingdon, Routledge), 289.

writing and memory. As with the writing of Theuth, Freud considers writing subordinate to the living memory, but nevertheless deployable in the service of the latter²⁴— to record is to guard against the ‘distrust’ of a future recollection²⁵; in this way, ‘the psychical is caught up in the apparatus’²⁶, which is to say that the *hypomnēsis* facilitates the living memory, rather than confronting the latter as a ‘dangerous supplement’. Whereas most techniques for writing are finite either in their space (a sheet of paper) or time (the constant erasure of the chalkboard), Freud’s attention is drawn by the invention of a peculiar apparatus, the *Wunderblock*. Much like a sophisticated palimpsest, this Victorian recording device consists in a piece of celluloid paper over a wax tablet; an inscription made upon the paper, without the use of ink, leaves an impression on the underlying wax, and it will show upon the paper until the paper and wax are pulled apart and placed together again, blank and ready to begin anew. Not only does this apparatus allow for infinite use of the topmost surface – which always returns to its pristine form: the inscription is each time retained permanently on the wax – if we remove the topmost layer, it is possible to view every historic inscription at once ‘under certain lights’. Thus we have a ‘double system contained in a single apparatus’²⁷; of recording and erasure. This system is, to Freud’s apparent delight, wholly analogous to the psychical apparatus: the “becoming-visible which alternates with the disappearance of what is written would be the flickering-up ... and passing-away... of consciousness in the process of perception”²⁸; while the wax that retains every inscription despite the refreshing of the topmost layer of the *Wunderblock* is analogous to the unconscious and the latter, like the former, is precisely what psychoanalysis aims to take out and view, ‘under a certain light’.

But this analogy, inasmuch as it values the double relationship between top-sheet and wax substrate, and insofar as it finds analogously in those wax impressions the true value of memory, overlooks the fact that, contrary to Freud’s Cartesian understanding of the psychic apparatus, “the machine *does not run* by itself”²⁹. Two hands operate the *Wunderblock* at any time, conducting respectively the work of impression and effacement; and so the contents of the wax substrata can never of their own volition arise to the surface. In short, something *more* must be at work in the economy of memory in order for the content of perception-consciousness to become *pressed down* into this wax or *lifted up* from the same. Nevertheless, the value of the analogy thus far has been to accentuate the necessity of the substrate in the work of the psyche:

²⁴ Ibid., 278.

²⁵ Ibid., 279.

²⁶ Ibid., 278.

²⁷ Ibid., 280.

²⁸ Ibid., 282–83.

²⁹ Ibid., 284 emphasis mine.

the whole psychic apparatus depends upon some form of exteriority, an *hypomnēsis* – which may very well, in working against our otherwise unfettered natural instincts, prove life-preserving or life-destroying.

In *Mal d'Archive*, Derrida elaborates that the *Wunderblock* is an “archival” model of the psychic apparatus. It “integrates the necessity, inside the *psyche* itself, of a certain outside”³⁰; and “with this *domestic outside*, that is to say also with the hypothesis of an *internal* substrate, surface, or space ... it prepares the idea of a psychic archive distinct from spontaneous memory, of a *hypomnēsis* distinct from *mnēmē* and from *anamnesis*: in institution, in sum, of a *prosthesis of the inside*.”³¹ The introduction of the psychical apparatus is the displacement of the concept of memory with the more problematic substance of the recording, or archival, prosthesis:

“The theory of psychoanalysis, then, becomes a theory of the archive and not only a theory of memory”³²

That there is such a thing as a psychoanalytic science, however, suggests that the corruption of nature, the *hypomnemic* distortion of the *logos*, is perhaps capable of being redeemed. Given that the conjoining of the psychic apparatus to the exteriority of writing-recollection is already a *partial* subversion of Platonism, we must ask why this turn is not complete; we must ask whether such completion is imminent.

Archive Fever

The *hypomnemic* recording of events in the form of an “archive” is a legal-political phenomenon by nature. Derrida recounts its etymology thus:

“In a way, the term [‘archive’] indeed refers, as one would correctly believe, to the *archē* in the *physical, historical, or ontological sense*, which is to say to the originary, the first, the principal, the primitive, in short to the commencement. But even more, and *even earlier*, “archive” refers to the *archē* in the *nomological* sense, to the *archē* of the commandment.”³³

The binding of the concept to authority is doubled over by its reference to a place of “exteriority” relative to the commencement-commandment in which it is entangled: the *arkheion*

³⁰ Derrida, *Archive Fever*, 18.

³¹ Ibid.

³² Ibid.

³³ Ibid., 1.

is “initially a house, a domicile, an address, the residence of the superior magistrates, the *archons*, those who commanded”³⁴ – those citizens, that is, who “possess the right to make or to represent the law”. The place of the *arkheion* is thus invested with the authority of the *archons*, becoming more than a home, but passing from the privacy of the *oikos* into the public domain: “on account of their publicly recognised authority, it is at their home, in that *place* which is their house...that official documents are filed”³⁵. The power of the *archons* is accompanied by their conservative responsibility as ‘the documents’ guardians’. Furthermore, “they are also accorded hermeneutic right and competence. They have the power to interpret the archives. Entrusted to such archons, these documents in effect speak the law: they recall the law and call on or impose the law.” It is therefore apparent that the archiving authority includes, but is not limited to, the hermeneutic function of judgement. Already we have a context that exceeds those legal-textual phenomena of judgement and inscription that are usually associated with deconstruction: the textuality of the law extends also, that is, to recollection, storing, *hypomnēsis*. The authority of the *archons* is doubled over by the locality of their homes:

“To be guarded thus, in the jurisdiction of this *speaking the law*, they [the archives] needed at once a guardian and a localization. Even in their guardianship or their hermeneutic tradition, the archives could do neither without substrate nor without residence”³⁶.

In this way, the doubling over of authority by the special locality of the *oikos* made *arkheion* results in the conceptualisation of an “*eco-nomic* archive in the double sense: it keeps, it puts in reserve, it saves, but in an unnatural fashion, that is to say in making the law (*nomos*) or making people respect the law... It has the force of law, of a law which is the law of the house (*oikos*), of the house as a place, domicile...or institution.”³⁷ And as with Derrida’s titular discussion of the *Force of Law*³⁸, this archivisation process is an inflection of the Benjaminian leitmotif of law-conserving and law-founding violence: “every archive,” Derrida explains, “is at once *institutive* and *conservative*. Revolutionary and traditional.”³⁹ The legal violence encountered in *Force of Law* is nothing more or less than an “archival violence” of institution and conservation.

Comprising a dialectic between foundation and conservation, the archive takes on the specific temporal structure of a ‘future anterior’: a grammatical form that appears not

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid., 1–2.

³⁷ Ibid., 7.

³⁸ Derrida, “Force of Law: the Mystical Foundation of Authority.” 11 Cardozo L. Rev. 919 (1990)

³⁹ Derrida, *Archive Fever*, 7.

infrequently in Derrida's work⁴⁰; one which entails the retention of the 'past' for the purposes of the future. The 'past' in this instance is not the simple form of a chronological past; it is not possible simply to record a past event. Such a recording is an interpretation; it is directed towards a point in the future, whereupon an archive will be opened up and the 'past event' will be ostensibly revealed. But in every instant of revelation, a new interpretation must take place and be stored in the same *hypomnēsic* manner; and so there is an infinite play of past and future; an iteration that defers forever the moment in the future when the 'past' can be redeemed in its truth. This is why, "[a]s much as and more than a thing of the past, before such a thing, the archive should *call into question* the coming of the future"⁴¹.

That 'two hands operate the machine' of the *Wunderblock* can now be understood in its deconstructive significance: one hand to impress; another to re-set the top sheet, an act which unavoidably effaces the surface of the impression. If the machine does not operate by itself, it is because it is, contrary to Freud's Cartesian sensibilities, intractably attended by *force*. And psychoanalysis, moreover, does not lack a concept equivalent to that force: the 'death drive' is the most primal instinctual element, it is a compulsion towards obliteration (of self and others) that is always being held in check by the injunctions of consciousness, of the super-ego.

By the time of writing *Civilisation and its Discontents*, Freud had conceded that the destructive 'death drive' was so compelling that he could not ignore it⁴², but in fact saw in its obliterating nature the source of all social inhibition and the malaise that accompanied the internalisation of institutional injunctions against the death drive⁴³. In a Hobbesian manoeuvre, Freud explains that it is the natural inclination of humans to destroy one another, to succumb to this death-drive: civilisation imposes fetters upon this drive which are in turn internalised in the mind of the citizen. This leads to a self-correcting mechanism which can only aggravate the death drive by intensifying the libidinal and egotistic desires that these internalised injunctions both produce and suppress⁴⁴. The death drive, in Derrida's view, lies not only behind the ailments of civilisation: it is also at work in the economy of remembering:

"As the death drive is also, according to the most striking words of Freud himself, an aggression and a destruction...drive, it not only incites forgetfulness, amnesia, the annihilation of memory, as *mnēmē* or *anamnesis*, that is the archive, consignation, the documentary or monumental apparatus as *hypomnēma*..."⁴⁵

⁴⁰ cf "Exergue", Derrida, J. *Of Grammatology*, trans. Gayatri Chkravorty Spivak, (1997) (John Hopkins University Press), 5.

⁴¹ Derrida, *Archive Fever*, 33.

⁴² Freud, S. *Civilization and Its Discontents*, trans. D. McLintock (2002) (London, Penguin), 56.

⁴³ cf *ibid.*, chap. 6.

⁴⁴ For a useful analysis, see Leo Bersani's Introduction to the 2002 Penguin Edition, *ibid.*, vii–xxii.

⁴⁵ Derrida, *Archive Fever*, 10.

In opposition to Freud, for whom remembering is a ‘given’ whereby the neurological processes lock away the original experience in the unconscious whence they might be recovered, Derrida argues that (since there is no such thing as an ‘original experience’), something else is happening in this process. And it has everything to do with this death drive which is “above all *anarchivic*... or *archiviolithic*”⁴⁶. The primal compulsion to destroy is also a compulsion to *forget*. If there is any recollection at all, it is in opposition to this ubiquitous destruction of all possible remembrance. As with civilisation, something, some injunction, must have *stayed* the death drive in order to allow the work of memory to take place. “The death drive tends thus to destroy the hypomnesic archive”; but “another economy” is also at work – “the transaction between this death drive and the pleasure principle, between Thanatos and Eros”⁴⁷. Let us recall that, whereas the self-generating work of the psychic apparatus could be taken for granted by Freud, the archivisation of memory upon the *hypomnēmic* ‘unconscious’ is operated by force – the two hands of conservation and foundation. These two hands are also an injunction: from the outside of consciousness, a conserving and founding violence. Just as, for Benjamin, legal violence was a variation on the purest form of violence; might we not understand archival violence as a variation on the destruction of the death drive – the injunctive force that keeps the latter at bay?⁴⁸

We therefore find Derrida working *with* Freud and *against* him:

“certainly, Freudian psychoanalysis proposes a new theory of the archive; it takes into account a topic and a death drive without which there would not in effect be any desire or any possibility for the archive. But at the same time, at once for strategic reasons and because the conditions of archivization implicate all the tensions, contradictions, or aporias we are trying to formalize here, notably those which make it into a movement of the promise and of the future no less than of recording the past, the concept of the archive must inevitably carry in itself...an unknowable weight”⁴⁹

This ‘unknowable weight’ is partially redeemed by the indication that there is nothing beyond the *hypomnēsis* of the archive, but the insatiable destruction of the death drive. Just as we cannot see the originary movement of the hands that operate the *Wunderblock*, neither is it possible to recall the first moment of archival violence in respect of the psychic apparatus. If the death drive is

⁴⁶ Ibid.

⁴⁷ Ibid., 11.

⁴⁸ The analogy is not drawn this far by Derrida, whose audience is not composed of lawyers or political theorists, but psychoanalysts and archivists. But it is a fair analogy, I think, and an instructive one.

⁴⁹ Derrida, *Archive Fever*, 29.

directed towards total obliteration, archival violence is the channelling of this destructive force towards archival, and thus precarious, ends; in an evident parallel to Benjamin's mythic and divine violence.

As with the Law of the Father, any reference to an originary authority, a first injunction, would only be mythical. It is the internalisation of this myth that gives the lie to the origins of law and the malcontent of "civilised" desires. The internalisation of the mythical injunction *not to forget* – which is the same as 'remembering' – gives rise to a similar malcontent, manifested in the iterative *desire* to recollect. Derrida calls this malcontent compulsiveness "archive fever", or "*mal d'archive*":

"We are *en mal d'archive*: in need of archives.... It is to burn with a passion. It is never to rest, interminably, from searching for the archive right where it slips away. It is to run after the archive, even if there's too much of it, right where something in it anarchives itself. It is to have a compulsive, repetitive, and nostalgic desire for the archive, an irrepressible desire to return to the origin, a homesickness, a nostalgia for the return to the most archaic place of absolute commencement"⁵⁰.

The nature of desire, and its iterability, is bound up with the grammatical form of the *hypomnesis*. Every archive promises the future revelation of the original event. For Freud, this is the redeemable promise of revealing the traumatic experience. But if, as Derrida suggests, this original event *cannot* be revealed, if there is no language beyond writing, no *mnēsis* beyond *hypomnēsis*, then the promise of an origin, the internalisation of the injunction to *remember* the origin, operates in the same manner as the law of the Father, as the internalised myth of the origin of law. When this promise of the origin is unfulfilled, the desire to substantiate it and recollect it *refuses this dissatisfaction*, continuing to compel the iterative creation of archive upon archive: to uphold that promise of an origin right in the wake of a disappointed promise, forever denied. This compulsion to recall the origin is a powerful longing: it causes us iteratively to create archives; to re-archive the content of those extant *hypomnēses* that we open up to reveal not an origin itself, but a promise that we must capture, conserve, reiterate, in the production of new promisory *hypomnēses*. The future-anteriority of archives both creates and is born of an internal operation against the death drive, it is propelled along by the *hypomnēmic* "capture" of obliteration and forgetfulness. It is the internal injunction against the "silent vocation... to burn the archive and incite amnesia"⁵¹, which constantly ignites in us a *mal d'archive*, this 'burning' desire: a desire

⁵⁰ Ibid., 90.

⁵¹ Ibid., 11.

that burns feverishly from within; but which also retains the force of this most primal desire to burn – as shall be presently suggested, archives are by their nature *incendiary*.

As with every Derridean account of law, of reason, of history – there is nothing ‘outside’ of the archive: no original authority that produces it; but neither is there an original experience that recollection can redeem. Psychoanalysis, in trying to access the lost memory, is yet another iteration of “archive desire...an impossible archaeology of this nostalgia, of this painful desire of a return to the authentic and singular origin, and for a return concerned to account for the desire to return: for itself.”⁵² Psychoanalysis will never reveal, that is, any original experience: it will simply create another archive of its own – for the analysand but also in its own epistemology⁵³. *Mutatis mutandis* for law, in practice and in theory: if we search for the origins of law, or if we construct a theory to reinstitute the same, we are beholden, like Freud, like all metaphysicians, to a nostalgia for origins: a *melancholia*, in Freud’s own idiom⁵⁴.

Against Archaeology

If Derrida has established the archive as a form of law; if we consider law to be indelibly *archival* insofar as it is a civilising force that keeps, like the Hobbesian sovereign, total destruction at bay while *harnessing* that destructive force towards artificial *hypomnēmic* ends; he also states that “we find ourselves here before an aporia”⁵⁵. This aporia inheres in the question as to whether one bases one’s thinking of the future on an archived *event*; or whether we can only record such an event because the structure of the psychic apparatus has made this possible in the unnatural form of the hypomnētic archive. He is asking, in short, whether it is possible to think of a pure futural event, ‘to come’, without recourse to an already unnaturally recorded *hypomnesis* – without, that is, an archive. In short, whether there must be “a first archive in order to conceive of originary archivability”.

We have already noted that it is not in the nature of deconstruction to allow for the presence of an origin behind the text. Archivisation, as a movement within the ‘text’ or *hypomnesis*, operates in the same way each time a repressed ‘experience’ resurfaces in the course of analysis:

⁵² Ibid., 84.

⁵³ A large section of the prolegomena is dedicated to the possible ‘lineage’ of psychoanalysis – I cannot address the point here

⁵⁴ cf Mourning and Melancholia, in Freud, *On Murder, Mourning and Melancholia* (2005) (London, Penguin).

⁵⁵ Derrida, *Archive Fever*, 79.

“By incorporating knowledge deployed in reference to it, the archive augments itself, engrosses itself, it gains in *auctoritas*. But in the same stroke it loses the absolute and meta-textual authority it might claim to have. One will never be able to objectivize it with no remainder. The archivist produces more archive, and that is why the archive is never closed. It opens out of the future.”⁵⁶

The indelible ‘remainder’, the promise of the future recollection, the disappointment of which is unacceptable to desire, propels the iterative archivisation process. This is in contrast to Freud’s belief in allowing the original experience to ‘return’ once and for all; and so Derrida observes that “Freud was incessantly tempted to redirect the original interest he had for the psychic archive toward *archaeology*”⁵⁷. Thus he propounds an opposition between archivisation and “archaeology” in which the putative effect of the latter (which corresponds to the talking cure) upon the archive of the psychic apparatus would proceed as follows:

“the very success of the dig must sign the effacement of the archivist: *the origin then speaks by itself*. The *arkhē* appears in the nude, without archive. It presents itself and comments on itself by itself. “Stones talk!” In the present. *Anamnēsis* without *hypomnēsis*! The archaeologist has succeeded in making the archive no longer serve any function. *It comes to efface itself*....so as to let the *origin* present itself in person.”⁵⁸

The ‘archaeology’ of psychoanalysis would not, in Freud’s view, give way to another archive. But it would render the archive redundant: *hypomnēsis* would be discarded in the immediacy of the link between experience and living speech. But, given that for Derrida ‘there is nothing outside’ the archive; and given that the redundancy of the *hypomnēsis* purports to do away with the archive which is poised against the very force of amnesia and forgetting, how might we characterise the distinction between the death drive and the “archaeology” that causes the ‘archive no longer [to] serve any function’? Is each annihilation of the archive equivalent? Can we draw a line between pure recollection and pure destruction?

It is of paramount importance that the Freudian destruction of the archive is not the destruction imposed by the untrammelled death drive: for Freud “does not *believe* in death”. A distinction is therefore drawn between ‘archaeology’ (the aim of psychoanalysis) on one hand, and the death-drive on the other; which, like the divine violence of the Benjaminian critique, Derrida has qualified not with the ‘absence’ of the mythical origin that will never come to light, but an intractable, futural ‘to come’, a ‘perhaps’. And so while the death drive is the destructive force that *induces* the archive, archaeology is the archive that does not know its own limits:

⁵⁶ Ibid., 67.

⁵⁷ Ibid., 91 emphasis mine.

⁵⁸ Ibid., 92.

“As we have noted all along, there is an incessant tension between the archive and archaeology. They will always be close the one to the other, resembling each other, hardly discernible in their co-implication, and yet radically incompatible....*different with regard to the origin, in divorce with regard to the arche.*”⁵⁹

Let us say, to begin, then, that ‘archaeology’ is a search for “origins” in which the latter are understood differently from those ‘beginnings’ created in the hands of the *archon* who at least sees the effect of his interpretive movements and is in no doubt as to fact that he alone is source of this *archive* (regardless of the source of his authority). It is thus to archaeology that Derrida refers when he speaks not only of the misguided search for the origin, but also of “the desire of an admirable historian who wants in sum to be the first archivist, the first to discover the archive, the archaeologist and perhaps the archon of the archive. The first archivist institutes the archive as it should be, that is to say, not only in exhibiting the document but in *establishing* it. He reads it, interprets it, classes it.”⁶⁰ Such an historian does not know his own fever, his own *mal d’archive*. In discovering the first archive he presents himself as *archon*, as the sovereign authority over memory; but this is to arrogate the power of cessation over the ‘fatal repetition’⁶¹ of archivisation that can only be accomplished by the unfettered death drive.

This disavowal of archaeology in *Mal d’Archive* is not unprecedented for Derrida: thirty years previously, he had argued against archaeology as a science of “betrayal”, again in the context of psychiatry; but on this occasion the charge was addressed to Foucault. In issue was Derrida’s critique of one of Foucault’s earliest pieces, *The History of Madness*. This early work⁶² was “haunted” by the experience of madness “condemned to silence by history”⁶³: it was an historical, phenomenological tract that aimed principally towards redeeming, in the name of freedom, the experience of madness from its discursive confinement. Foucault argued that madness only began to be excluded from “reason” from the seventeenth century onwards; that it had previously enjoyed a life alongside rational discourse, as equally ‘allowable’ speech, often as a type of ‘wisdom’. In the dawning realisation that there was no available ‘subjective experience’ as Freud believed (and in this Foucault joins Derrida in rejecting phenomenology), the experience of madness that had been silenced by the discourse of reason could still be encountered, even if

⁵⁹ Ibid., 91.

⁶⁰ Ibid., 54–55.

⁶¹ Ibid., 67.

⁶² Which was so problematic for Foucault that it was published twice, the latter edition of which Todd May describes as a ‘mongrel’ piece of work in which Foucault was still advancing, heuristically, through the Marxist-phenomenological dyad that characterised French thought at the time. See May, T. “Foucault’s Relation to Phenomenology” in Gutting, G (ed) *The Cambridge Companion to Foucault*, (chap. 10.

⁶³ Boyne, *Foucault and Derrida*, 53.

it could not be ‘made to speak’, if we could trace a *the historic instances* of its exclusion – an “archaeology of silence”.

Now, for Derrida, this ‘archaeology of silence’ could not redeem the speech of madness from the moment of its exclusion, for even a topology of the gaps on the surface of discourse where the speech of madness ought to be was nothing but another instance of discursive organisation:

“is there a history of silence? Further, is not an archaeology even of silence, a logic, that is an organised language...a work? Would not the archaeology of silence be the most efficacious and subtle restoration, the *repetition*, in the most irreducibly ambiguous meaning of the word, of the act perpetrated against madness [?]...”⁶⁴

Derrida argued, first, that reason has *always* excluded its other, but that this is not an expulsion of madness to a ‘privileged space outside of reason’ but an ‘internal exile’ interior to *logos*.⁶⁵ As Roy Boyne explains, for Derrida, the ‘gaps’ that Foucault found in discourse as the residue of their apparent silencing only iterated an unwitting belief that “there is something present behind the concept”⁶⁶. As we have seen, the radical absence of an ‘origin’ effects the iterative process of writing or *hypomnēma* that tries and fails to reinstate the origin while promising its future arrival. This is only achieved in a violent act of exclusion (of forgetfulness, nothingness, or madness) that must be repeated each time the promise of the origin is disappointed. Secondly, because all rational narratives suffer from this internal cleavage, within which they will consistently work in order to attempt to declare once and for all the order of things, any organisation of events, any topology of meaning at all, must repeat this process of exclusion in order artificially to substantiate the tenuous truth of the narrative in question. Foucault’s archaeology is no exception: in constructing an archaeology of silence, Foucault must artificially organise a topology of silences, and in so doing, internally exclude the possibility of non-rational or disorganised speech – to exclude, that is, the very domain of “madness” that he had set out to redeem.

If an archaeology of the living experience is simply impossible, to trace the marks of excluded speech on the surface of history is a betrayal. Understood in legal-theoretical terms, the impossibility of an authentic ‘archaeology’ corresponds to the absence of legal authority; its complicity with every other rational discourse, every other history as a *hypomnetic* act of

⁶⁴ Derrida, “Cogito and the History of Madness” cited *ibid.*, 58.

⁶⁵ *Ibid.*, 67.

⁶⁶ *Ibid.*, 68.

recollection, is an instance of enjoining in the mythical re-instantiation of that authority. If we wanted to redeem, for example, the constituent power that is curtailed in the instantiation of every constitution, we could neither direct our efforts towards an original event (as Derrida explains in *Declarations of Independence*⁶⁷); nor could we hope to *expose* those moments of its exclusion, thereby *indicating* its substantive nature, without committing a further act of exclusion – at least not in any useful way, which is to say: in a language that the law itself can understand⁶⁸. One cannot speak on behalf of the constituent without always-already using the discourse of constituted law; one cannot reveal a memory without always-already consigning the latter to *hypomnēsis*; and one cannot perform an archaeology without always-already instituting another archive. The future anteriority of the *hypomnēsis* in which the source of law is promised and internalised in an injunction against death and obliteration compels iteration upon iteration; and yet the vantage point of this future anteriority is nowhere scrutinised, the *necessity* of this injunction nowhere put into question. It is to assume that the internalised injunction of the mythical sovereign authority will always be civilising; that it will always instil the desire to *recollect*, to work against, to capture, the wholesale destruction of forgetting. But what kind of mythical authority is this, what kind of sovereignty, if it is only capable of keeping such destruction *in abeyance*?

In what is seemingly the only existing discussion of *Mal d'Archive* that categorises itself under the heading of “legal theory,” Cornelia Vismann traces historical instances of archiving, alighting upon the curious paradox of the ‘obstinate archive’. The already problematic substrate of the flammable archive, which is always exposed to destruction, is doubled over in the discovery of lead scrolls which have remained deliberately unopened:

“The lead roll archive rocks the basic archival paradox of indestructibility. Archives are supposed to be inalterable, yet as a rule they are not, because even archives are affected by time and because all archiving changes and erases the archived. The Athenian lead roll archive, however, escapes this relentless process of dissimulation and destruction. It undermines the basic archive rule of inevitable alterability by staying closed within itself...”⁶⁹

⁶⁷ Op. cit. supra, n.12

⁶⁸ These are the ultimate stakes of the eviction of archaeology from a legal perspective: we will return to them in Chapter Four.

⁶⁹ Vismann, C. “The Archive and the Beginning of Law,” in Goodrich, P (et al.) (eds), *Derrida and Legal Philosophy* (2008) (Palgrave Macmillan), 49.

The threat of imminent destruction, the incendiary motivation to keep records, the burning impulse of the ‘burning’ desire that Derrida has called “*mal d’archive*” – all of this is negated in the mysterious lead scroll that has been inscribed and never opened (until now). The contents of these scrolls (lists of horsemen and the price of their horses) do not illuminate matters further. Vissman explains that the lead scroll is the “zero-point” of the archive⁷⁰. “The unused archive,” she explains, “is the perfect archive... [the] lead roll archive keeps its promise of inalterability so absolutely that it shuts itself off even against time”⁷¹. In its muteness and ineffaceable substratum, this paradoxically ‘obstinate’ archive is not really an archive at all; rather, “[it] marks the (archaeological as well as historical) zero point of the archive; a blank.”⁷²

Vissman notes that “Derrida declined to get involved in such an archaeology of the archives,” suggesting that he would have been confronted by the muteness and closure of archives in ‘their sheer physicality,’ in which “nothing would be learned... about the beginning of law”⁷³. It is as if, in the interests of understanding law, we must steer clear of the discoveries that would be made by a more *thorough* excavation of archives, adopting a kind of historical asceticism:

“So, one would have to distinguish between two sciences of the beginning: *arkhé*-logy and archive arachaeology. While *arkhé*-logy, the science of the commencement, reads a beginning (*arkhé*) back into the origins and thus arrives unmistakably at the rule of law, an archive archaeology steps out of the symbolic order. It refers to that which does not speak, the space of the archive, the shelves, the dust. It mistrusts words and especially the word *arkhé* itself.”⁷⁴

Although it is nowhere indicated or stated by Vissman herself, it appears that there is *more* to this opposition between ‘*arkhé*-logy’ and ‘archive archaeology’ than a simple contrast between deconstruction and archival science. If the obstinate lead archive perplexes us, perhaps it is because it rests upon the *limit* of the archive. Mute and incombustible – the lead scroll has the structure of the archive without any of its *hypomnēmic* qualities. It is an archive that is not an archive: it is the exception, the excluded part within that ‘archival’ category to which it belongs. We could say, of course, that once archival science *has opened* the scroll, its physicality and its content are reinterpreted under *hypomnēmic* auspices. This is true; but it is of secondary importance. The muteness of the scroll suggests that the *archon* by whose authority that same

⁷⁰ But this – not necessarily of archives as historical objects (who is to say that a lead scroll was chronologically ‘first,’ and what would we possibly hope to learn from this?); but of the whole archive ‘problem’.

⁷¹ Vissman, “The Archive and the Beginning of Law,” 49–50.

⁷² Ibid., 50.

⁷³ Ibid., 51.

⁷⁴ Ibid.

lead scroll was created did not, as is the case with other archives, *intend* to inscribe the promise of futurity in that archive: it would not constitute an injunction against forgetting, for its very purpose was to be withheld, forever, from human memory. Furthermore, its indestructibility is at odds with the fact that the scroll was never intended to be recollected in the future. What Vismann regards as obstinacy appears to be twofold: not simply indelibility, but an obnoxiousness, almost a resentment, of the pseudo-archive that wants to insure that it is retained but not remembered.

In fact the lead scroll is the exception that *guarantees* the archival series by exempting itself from the promise of future recollection and the delicacy of the *hypomnētic* substrate. And it is associated with exceptional cultural circumstances: the exquisite beauty of pyramidal tombs, the enclosure of treasured possessions inside the sacred resting places of the dead – none of which are to be reopened for as long as humankind remains. In summation, the exception to the archival rule is associated with a deliberate choice to *forget*; an acceptance, out of love or reverence, of the destruction of death – without resistance or desire. A sovereign decision is made, that is, precisely *to forget*: and this choice is demonstrated in its permanency by the incombustibility of the chosen substrate. That the content of the lead scrolls should be so beguiling, however, is the final factor in this exceptionalism: neither love nor reverence, nor the authority of the gods of the underworld, is by necessity involved in the cataloguing of the horsemen and the price of their horses. The sovereign ability to *enforce forgetfulness*, and thereby to *suspend the injunction* against forgetting, is demonstrated in its purity in this obstinate archive. And so the lead scroll retains on the substratum a withdrawal of the sovereign injunction against forgetting: for, should we act impulsively to archive that scroll in a new history, to give it a ‘first’ interpretation – are we not acting on our own authority? The link between the injunction of the *archons* and the *mal d’archive* of the archivist has been broken. Can we feasibly maintain that what follows is an *iteration* of an impossible rule instead of the *decision*, the self-sufficient interpretation of the archivist *now*, in the present? Can we claim that the archival act is still in pursuit of a promised origin if we know from the start that the substrate that it catalogues does not partake of the dialectic between memory and forgetting, but instead sovereignly withdraws its rule in a demonstrative inscription that *blurs the boundary* between memory and forgetting?

Neither Freudian archaeology in search of original experience, nor the nascent Foucaultian ‘archaeology of silence’ confronts this obstinate exception; and so, in Derridean discourse, at least in the context of law and archive, it has gone unattended. Might we hope to glean something further in Vismann’s seemingly unwitting insight? Might it be possible, even necessary, to conduct an ‘archive archaeology’ that does not succumb to the iterative *mal d’archive*;

one which is capable of re-articulating ‘beginnings’ in light of this *exceptional* archive; of working, if not *with* deconstruction, then certainly not *against* the same?

Archaeology after the Archive: Agamben’s *Philosophical Archaeology*

Like Derrida, Giorgio Agamben is similarly concerned with the exposition of, and critical opposition to, transcendent ‘origins’. Thus there are several facets in common between deconstruction and Agamben’s *Philosophical Archaeology*: both concern the exclusion of the ‘other’ as a condition of a sphere of rationality; both illuminate the obfuscation of the ‘empty’ origin by tradition. Importantly, both of these approaches posit the nature of the law – of what we might tentatively call the “Law of law” – in the same grammatical form of the ‘future anterior’. However, these similarities serve only to punctuate the radical distinction between the two methods: while deconstruction inheres in an intractable process of ‘iteration’ within a colossal rationality or language or history for which *there is no ‘outside’*, Agamben’s ‘philosophical archaeology’ is directed precisely at finding a way *beyond* or *before* the order of tradition. This strategy, as we have seen, is unacceptable to deconstruction, for which reason and language ‘internalise’ the excluded other: Agamben’s archaeology operates on the premise that every historical order by necessity guarantees its coherence by excluding as ‘other’ a “heterogeneous stratum” with which it maintains an ascendant relation, pushing it ‘outside’ the intelligible sphere. Instantly, the stakes in the opposition of deconstruction and archaeology become visible: for, if it is possible to establish the *necessity* of this ‘outside’ sphere, then it must also be possible to engage with the same, in a way that could, potentially at least, allow the abandonment of the incessant iterative process of ‘archivisation’ – a cure for the *mal d’archive* that was so apparently ‘fatal’. However, in order to effect such an archaeological ‘cure’, it is necessary that Agamben not only proves that this *archē* is an intractable ‘function of history’ and therefore *beyond doubt*; and not only that he satisfactorily posits a method that will apprehend the newfound *archē*; but that he also demonstrates, in the final instance, that the process of ‘going outside’ in which all this archaeological work culminates is more strategically feasible – or at least more *desirable* – than the iterative archivisation process that remains unhappily *within the law*. The following elaboration of Agamben’s ‘archaeology’ therefore proceeds in two parts: the first elucidates the nature of the *archē* and its function in establishing the conditions of possibility of historic and intelligible orders; the second explores the emancipatory claim made for ‘archaeology’, in the sense of re-capturing the ‘outside’ of an order and turning it to critical use.

Conditions of Possibility: Heterogeneous Strata

The first premise of Agamben's *Philosophical Archaeology* is that the conditions of possibility of a discrete and unified order are posited from within that order itself. Such conditions, rather than inhering in the form of a 'transcendental a priori' or a similar transcendent, universal 'origin', emanate from *elsewhere*, and it is the task of the essay to suggest the nature of this source and to pose the question of our possible means of access to the same. Encountering this revised 'beginning' involves the introduction to thought of a 'special kind of past that neither precedes the present chronologically as origin nor is simply exterior to it'⁷⁵. Agamben leads with the example of the work of Franz Overbeck, in whose thought we may find an early insight into these revised and non-transcendent conditions of possibility: in his critique of historical tradition, Overbeck expounded "the idea that all historical inquiry involves the identification of a fringe or of a heterogeneous stratum that is not placed in the position of a chronological origin but is qualitatively other"⁷⁶.

This 'heterogeneous stratum' holds the key to the conditions of possibility of a unified historical tradition, which can only 'live by itself' insofar as "[h]istory and prehistory, originally unified, irrevocably separate from each other"⁷⁷. An historical tradition retains its unity and intelligibility, in other words, insofar as it is able to position itself against the background of its other: against a 'prehistory' which it 'constitutively' excludes from itself. This prehistory is not to be found at a point that chronologically precedes 'history' – this would be technically impossible, for the historical narrative would always-already exclude that which it could not account for, or otherwise contain it within its own linear narrative (such is the post-metaphysical impossibility of accounting for all time and the necessity of any historiographic science). Instead, its 'qualitative otherness' allows the historical narrative to delineate its boundaries and to entrench its unity without jeopardising its own logic. This is nothing more, then, than a technique emanating from within the historical tradition to cover over the arbitrary schism between historiography and an otherwise incalculable *res gestae*. In this way, every historical tradition occludes the fact of its arbitrary emergence insofar as it "bars access to the sources"⁷⁸ of history; and it is in opposition to this tradition that the work of archaeology takes place. Agamben states, provisionally:

⁷⁵ Agamben, G "Philosophical Archaeology," in Agamben, G *The Signature of All Things* trans. L. D'Isanto with K. Attell (2009) (New York, Zone Books), 94.

⁷⁶ Agamben, "Philosophical Archaeology," 84.

⁷⁷ Ibid., 86.

⁷⁸ Ibid., 88.

“we may call “archaeology” that practice which in any historical investigation has to do not with origins but with the moment of a phenomenon’s arising and must therefore engage anew the sources and tradition”⁷⁹

If we wish to encounter the ‘moment of a phenomenon’s arising’ in its shallowest purity, we must therefore avoid using the same occlusive narrative that invents the heterogeneous stratum of its purported ‘prehistory’ or its ‘past’. We certainly must not imagine “a unitary... prehistoric stage before a historical split with which we are familiar,” for this would be to reiterate the logic of the split and to ensnare critique within the logic of tradition. Thus we cannot contemplate a ‘pre-law’ that existed at some time as a ‘more archaic law’: to do so would be to characterise what went before the unified system of ‘law’ using the very predicate (law) with which it defines itself, projecting this predicate back into a ‘past’ to which it does not, without the subterfuge of its tradition, belong. The task of archaeology would be to account for the ‘moment of arising’ of the historical discourse in question without using the logic of that self-same tradition in order to give that moment its expression, as the distinction between the order itself and its heterogeneous ‘past’ rendered in its own image. And yet this is an incredibly difficult undertaking, for “the moment of the split is governed by the split itself”: the force of tradition is formidable. If “[w]hat is at stake in [philosophical archaeology] is not properly a past but a moment of arising,” it is nevertheless also the case that access to this moment

“can only be obtained by returning back to the point where it was covered over and neutralised by tradition (... to the point where the split occurred between the conscious and the unconscious, historiography and history).”⁸⁰

In short, we may account for the ‘moment of arising’ without using the logic of the split and without attempting to pose our own version of the past, if we consider the very structure of the split as an epistemological necessity, one that can be isolated and encountered in its own right:

“The a priori that conditions the possibility of knowledge is its own history grasped at a specific level. This is the ontological level of its simple existence... the brute fact of its ‘moment of arising’.”⁸¹

Such, Agamben suggests, is the nature of Foucault’s ‘historical a priori’: “the paradox of an a priori condition that is inscribed within a history and that can only constitute itself a posteriori

⁷⁹ Ibid., 89.

⁸⁰ Ibid., 105.

⁸¹ Ibid., 93.

with respect to this history in which inquiry – in Foucault’s case, archaeology – must discover it”⁸². In this respect, archaeology distinguishes itself from ‘history’: if the latter guarantees its own unity by excluding a heterogeneous stratum or a ‘prehistory’, the former catalogues precisely this instance of exclusion, demonstrating it in its factual (and thus ahistorical) occurrence. Insofar as it has not yet been overcome, “the condition of possibility in question in the historical a priori that archaeology seeks to reach is not only contemporaneous with the real and the present. It is and remains immanent in them as well.”⁸³ Agamben gives the example of déjà-vu⁸⁴, in which memory is coterminous with the present but, whenever the consciousness relaxes, appears to have the form of a past experience. In this way, we find that history and prehistory, for example, “are in actuality contemporaneous, insofar as they coincide for an instant in the moment of arising”⁸⁵. We might say, then, that the historical tradition in this case undergoes a ‘relaxation of consciousness’ in which it ‘forgets’ that the prehistory it excludes from itself belongs, in fact, to its present. The task of archaeology is to ‘retreat towards the present’⁸⁶ in a manner that brings this contemporaneity to light.

To summarise, then, what is in issue so far: the “moment of arising” of a particular order or history is covered over by the function of an ‘historical a priori’ that has the effect of excluding from the order a non-chronological, but heterogeneous, stratum, of which ‘prehistory’ is the paradigm. Archaeology works against the content of this historical a priori in order to bring it to light in its facticity. In doing this, we apprehend the ‘moment of arising’ of the order, insofar as we show the excluded past in its contemporaneity with the historic present, placing them both in a ‘zone of indistinction’, in a moment immediately prior to the splitting off of one from the other.

This moment of arising, the instant *before* the split, escapes the logic of the split and the tradition, and therefore history and prehistory alike. It has a special epistemological significance as the *archē* of the order, laden with meaning and possibility: “the *archē* alone is able to guarantee the intelligibility of historical phenomena”⁸⁷, not because it is a pale a priori invented by the tradition that occludes the occurrence of a moment over which its own logic could never reign, but because the *archē* “is an operative force within history, like... the child of psychoanalysis exerting an active force within the psychic life of the adult”⁸⁸. The moment of arising is the flash of the instant before the “split” to which each tradition has access but which only an

⁸² Ibid., 94.

⁸³ Ibid., 95.

⁸⁴ The reference is to Henri Bergson. Ibid.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ Ibid., 110.

⁸⁸ Ibid.

archaeological practice can render contemporaneous and therefore null; in this nullification, archaeology hands the split over to the infinite ‘force’ of the *archē*, which is without substance or content, and which, once recuperated, can be given over to critique for the first time. If this is the true origin of every order, the ‘law’ of intelligibility, it enjoins in the grammatical formation of the archive, but in a different sense:

“the *archē* of archaeology is what will take place, what will become accessible and present, only when archaeological inquiry has completed its operation. It therefore has the form of a past in the future, that is, a *future anterior*”⁸⁹

If for Derrida the archive took the form of a ‘future anterior’, it was because each instantiation of law promised the coming of an origin; every recollection the return of an original experience. In short, it corresponded to the inability to cease producing archive upon archive, in an infinite dialectic of the desire for ‘memory’ and the destruction of forgetting. For Agamben, by contrast, the future anterior pertains only to that which remains once the boundary of history, of the distinction between memory and forgetting, have been transgressed once and for all:

“Archaeological regression, going back to the hither side of the dividing line between the conscious and the unconscious, also reaches the fault line where memory and forgetting, lived and non-lived experience both communicate with and separate from each other”⁹⁰

In other words, as Thanos Zartaloudis explains, the relationship between the split and the archaeological overcoming of that split entails a ‘transcending’ of the ‘transcendent’:

“The transcendent character of the distinction between pre-history and history, historiography and *res gestae*, origin and institution or tradition posits the necessity of the tragic and infinite repetition of an infantile or foundational scene. The transcendence of such a distinction dictates the way of representing the time ‘before’ the distinction itself was made, or rather, silencing it.”⁹¹

Therefore the *archē*, the moment of arising before the ‘split’ between an order and its ‘constitutively heterogeneous’ strata, *shares* the grammatical form of the archive. And like the *mal d’archive*, it too corresponds to an ineluctable ‘force’. And yet the crucial distinction between archaeology and archival iteration inheres in the fact that Agamben will suggest, and which I

⁸⁹ Ibid., 106.

⁹⁰ Ibid., 102.

⁹¹ Zartaloudis, T. *Giorgio Agamben: Power, Law and the Uses of Criticism*, (2010) (Abingdon, Routledge) 180.

shall now discuss, that the *archē* allows us to achieve *more* than the ‘tragic and infinite repetition’ of history upon history: opposing ‘archaeology’ to ‘history’ in this way will give us access to the *archē* once and for all, in a manner that is *uniterable*.

The Archaeological Cure

If Derrida’s principal critique of Freud was that his ‘archaeological’ search for a ‘repressed experience’ was a misguided search for a forgotten experience, Agamben’s archaeology risks replicating the offence. For Agamben describes the archaeological method as a form of ‘regression’ – albeit one which is “elusive”:

“it does not seek, as in Freud, to restore a previous stage, but to decompose, displace, and ultimately bypass it in order to go back *not to its content* but to the modalities, circumstances and moments in which the split, by means of repression, constituted it as origin.”⁹²

The parities, however, between this archaeology and psychoanalysis are apparent. In the previous section we established the objective of archaeology: to establish the *true* source of knowledge in opposition to the constitutive heterogeneous strata of tradition and order: in drawing these differences to a point of indistinction, the source of knowledge was revealed to be the force, the *archē*, beyond or ‘before’ that point. But what, if anything, has been the purpose of finding this source, of doing critical damage to the historical a priori in revealing it for what it is? Agamben’s critique harbours a political aim: it is not simply an epistemological exercise, but a means of emancipating a lost politics. And yet this emancipation is not to be confused with the liberation of a repressed experience:

“It is not merely a question of bringing the repressed... to consciousness.... Nor is it a matter of writing the history of the excluded and defeated, which would be completely homogeneous with the history of the victors”⁹³.

If we are not retrieving a traumatic experience (as is the case in psychoanalysis) or a counter-history of the oppressed, then what is the *object* of this ‘archaeological regression’? What, in going ‘beyond’ the split between memory and forgetting, are we setting out to retrieve if not something

⁹² Agamben, “Philosophical Archaeology,” 103.

⁹³ Ibid., 98.

‘forgotten’; and how are we to describe the dynamic whereby this ‘retrieval’ is made, if not as bringing what has been lost back to ‘memory’? In Agamben’s words:

“If memory thus constitutes the force that gives possibility back to what has been (and nevertheless confirms it as past), forgetting is what incessantly removes it (and yet somehow guards its presence). Instead, the point of archaeology is to gain access to the present for the first time, beyond memory and forgetting or, rather, at the threshold of their indifference.”⁹⁴

Rather than retrieving an original experience by making it ‘speak’, archaeology sets out to encounter ‘the present for the first time’. This unusual form of ‘experience’ is not the repressed yet redeemable event in the life of the analysand; and yet neither can it be said to serve the *hypomnēmic* instance of the ‘archive’ which would belong, in Agamben’s terms, to tradition. The internal cleavage of otherness belongs to the logic of the split: if we are to get beyond it, then the nature of this ‘beyond’ requires unpacking if we are to appreciate the force of philosophical archaeology and its significance for law. Agamben elucidates further:

“before or beyond the split, in the disappearance of the categories governing its representation, there is nothing but the sudden, dazzling disclosure of the moment of arising, the revelation of the present as something that we were not able to live or think”⁹⁵.

A ‘dazzling’ moment, a ‘revelation’ of the present, and the *negative* category of what we were *not able to live or think*. It is not simply that a concrete experience like a trauma has been retained and covered over: beyond the split we find not the revelation of past history of the life of the analysand, but rather an “unlived past”. Instead of retrieving what “has been” covered over, we encounter “what has never been, what was never willed”⁹⁶. In other words, we are concerned with the “non-lived”, with “that which is not lived in every life”⁹⁷. There is little elaboration in *Philosophical Archaeology* over the function or nature of this negatively defined ‘lost’ experience; however, Zartaloudis’ reading of the piece understands this ‘dazzling’ moment as the point at which the full potentiality of a ‘form-of-life’ can be encountered for the first time:

⁹⁴ Ibid., 106.

⁹⁵ Ibid., 99.

⁹⁶ Ibid., 103.

⁹⁷ Agamben, G. “Philosophical Archaeology,” cited Zartaloudis, T. *Giorgio Agamben*, 181.

“The non-lived is not a bare life, but a co-temporary and co-present plane of a form-of-life, wherein the lived and the non-lived cannot be separated. To risk one’s self in the non-lived is to assume life in its possibilities... without separating human being from what it can do.”⁹⁸

In Agamben’s *Homo Sacer*, ‘bare life’ is the ‘abandoned’ element of ‘life’ that is constitutively excluded as *zoe* from the political life or *bios*; and which always threatens its return in modern democracies, insofar as governmental power is exercised in accordance with a permanent state of exception in which ‘bios’ and ‘zoe’, political life and bare life, are rendered indistinct, to the effect that the law can suspend itself from the life of the legal subject or the citizen, ‘abandoning’ it by withdrawing from it, and rendering it in the position of ‘bare life’ at any moment. *Form-of-life*, in contrast to the dualism *zoe/bios*, represents life in its full potentiality; as neither the political life that is engendered out of an exclusory logic, nor the bare life that is excluded by the same. Agamben’s ‘assault’ on the “Law of law”, explains Zartaloudis, “does not point to yet another inquest into the supposed proto-religious, pre-juridical or other bearing of the sacralised referent in each instance, but instead to the study and elimination of the pseudo-bipolarity that is presumed to operate between law/lawlessness, forms of life/bare life, the pre-political and politics”⁹⁹. And so, just like the ‘form of the x’ that we are encouraged to ‘imagine’ in the place of a pre-law, the form-of-life is a life without predicates; it is life in the form of *quodlibet*, a ‘whatever-being’, not in the sense of indifference, but in the sense of “a being such that it always matters”¹⁰⁰. We may read the constitutive heterogeneity of the split between history and prehistory as an epistemological replication of the sovereign logic of the governmental apparatus; and so the past that ‘has not been lived through’ that archaeology summons through its own particular therapeutic form of ‘regression’ is therefore commensurate with establishing a ‘form-of-life’ that resists reduction to the sovereign indistinction of *bios/zoe*:

“The non-lived is not a bare life, but a co-temporary and co-present plane of a form of life, wherein the lived and the non-lived cannot be separated. To risk one’s self in the non-lived is to assume life in its possibilities... without separating human being from what it can do. The ... foundational imagery that occupies the supreme place of the understanding of law...is not to be perfected or counter-criticized or to be seen as an indestructible weight on the shoulders of a transcendent angel of history... but instead the aim is to revoke each mythological crystallisation ...of power... and to destroy the imagined absolving of its represented, though repressed, totality”¹⁰¹

⁹⁸ Ibid.

⁹⁹ Ibid., 157.

¹⁰⁰ Ibid., 286.

¹⁰¹ Ibid., 181.

Archaeological regression, then, does not summon an original lived experience, but the pure potentiality of an ‘unlived’ or non-lived experience that, in its fulfilment, would render ‘inoperative’ the polar distinctions – *this* historical tradition or *this* prehistory, *this* memory or *this* forgetting, bare life or political life – that constrict life and thought and subject them both to an executive power without legitimacy.

Going beyond memory and forgetting, beyond history and prehistory, archaeology therefore “moves backward through the course of history”. Its “regressive force” retreats “toward the point where history... becomes accessible for the first time, in accordance with the temporality of the future anterior”¹⁰². And so the stakes in this archaeological cure can be distinguished from the ‘return’ of the traumatic experience in psychoanalysis: ‘History’, in its pure potentiality – what has been lived, together with all that has not – becomes not visible *again*, but for the ‘first time’, and only insofar as we have first rendered each side of the split indistinct in the form of the ‘historical a priori’ which, in exposing the temerity of tradition, indicates the truth of its moment of arising. Thus the ‘future anterior’ germane to Agamben’s archaeology can be distinguished from the iterative ‘future anterior’ of *différance* posed in Derrida’s ‘archive’. Unlike the continuous positing of a past whose proof is ‘still to come’, this ‘future anterior’ waits to be redeemed in a time ‘before’ the split: we encounter it only once, once the split has been sutured once and for all. The inextricable dialectic between memory and forgetting that inscribed the search for the origin into the iterative desire of the *mal d’archive* is overcome once and for all in the work of archaeology; and it is not an origin as such, but the purity of human potential, that is redeemed at the conclusion of its regression through history.

And yet, Zartaloudis’ reading does not appear to consider the opposition between memory and forgetting *dispelled*, even after the work of archaeology has been brought to a close. The progression beyond the split may very well be the only *available* means of attaining emancipation in light of the bipolar functioning of every constitutive heterogeneity by which the articulation of power on knowledge and law is organised;

“Yet to think of life as in a form-of-life or in its contemporary presence with the non-lived does not make for an all-powerful life... Remembering something entails also its forgetting, to speak of the true paradox of human memory, and life more generally. There are no guarantees.”¹⁰³

¹⁰² Agamben, “Philosophical Archaeology,” 107.

¹⁰³ Zartaloudis, *Giorgio Agamben*, 181.

Archaeological regression, insofar as it does not summon a *lived* experience; nor an origin or event; not a concrete idea; not an ideology and not even a *class* – opens the way simply towards a ‘risk’. Going beyond the split and opening the non-lived experience for the first time may render the apparatus of law and government, history and memory, *inoperative* – but it does not imply that the work of ethics or politics is necessarily complete. We must still elect what to remember, and to forget, afresh. Must we understand this as a concession to deconstruction? Must we therefore re-engage in the task of archiving?

The ‘form of life’ that we encounter once archaeology has cured us of the repressive bipolar apparatus in which we live corresponds to a politics which is “the sphere neither of an end in itself nor of means subordinated to an end; rather, it is the sphere of a pure mediality without end intended as the field of human action and human thought”¹⁰⁴. The ultimate objective of the archaeological work is the abandonment of ends, of the Idea that prompts the institution of the split; its aftermath involves the complete abandonment of every predicate and the instantiation of language as ‘pure mediality’. And yet, it is less clear that the radical eviction of every predicate in the *common* sphere should allow us to avoid either the iterative process of agonism (in which we re-engage ends iteratively, defying the point of our going ‘beyond’ the split as such) or, alternatively, the silence of individualism. And yet the iterative archiving brought on by the untranscended dialectic of memory and forgetting amounts to little more than a process of ‘irritation’, of a constant dwelling within the law, of a struggle against repression that yields very little freedom (such is the nature of a negative dialectic). In the absence of an obvious solution (and I shall not attempt to put one forward in this thesis, for it is my view that the problem is, if not insoluble, circumvented in any case by returning to Foucault’s archaeology), it is perhaps helpful to consider the reasons for which the opposition of ‘archiving’ and ‘archaeology’ takes the form of an opposition between ‘iteratively’ staying *within the law* and the strategy of ‘going before’ or ‘beyond’ the law. It is helpful, that is, to elucidate, in respect of such opposing stratagem concerning the same substance of memory and forgetting, their underlying common ground.

Iteration and Beyond

We noted that the opposition of the sense of ‘archive’ to Agamben’s method of ‘archaeology’ institutes a gap between two incompatible theses: of the ineluctable iteration of law, and the

¹⁰⁴ Agamben, *G Means Without End*, trans. V. Binetti and C. Casarino (2000) (University of Minnesota Press), 117.

archaeological task of ‘going beyond’ the law. Each of these theses excludes the possibility of the other: we are either ensnared in the *mal d’archive* which instils in us the desire iteratively to respond to an injunction, to found and conserve the law and the archive; or we reveal the conditions of possibility of the law by collapsing the historical tradition into the constitutively heterogeneous element on which it is founded, in a manner that *destroys* this tradition once and for all. And yet, each theory shares in common a concern with ‘justice’ in the form of ‘messianicity’ and ‘messianism’ *respectively*. Let us first consider Derrida’s understanding of the relationship between archive and ‘messianicity’:

“The condition on which the future remains to come is not only that it not be known, but that it not be *knowable as such*. Its determination should no longer come under the order of knowledge or of a horizon of preknowledge but rather a coming or an event which one *allows* or *incites* to come... It is a question of this performative to come whose archive no longer has any relation to the record of what is, to the record of the presence of what is or will have been *actually* present. I call this the *messianic*, and I distinguish it radically from all messianism”¹⁰⁵

For Derrida, a “spectral messianicity is at work in the concept of the archive and ties it, like religion, like history, like science itself, to a very singular experience of the promise;” (36) the inscription of justice that is ‘still to come’ into every moment of the archive. The call to justice is the ethical impetus iteratively to continue not only to pronounce judgements, but to dismantle them and re-found them, a textual process from which, as with language and reason, there is no prospect of escape – not without, that is, doing some form of *injustice*. In this sense, justice is always inscribed in the law in some way, as an ethical compulsion, a meeting of violence and the need for justice. It is in this sense that Derrida halts before the Benjaminian call to total justice, to ‘divine’ as opposed to ‘mythical’ violence, showing the latter to entail, without the prospect of true authority or origins, the *need* to do justice.

Zartaloudis critiques, on Agamben’s behalf, the reductivism of inscribing justice, into the present law, in which “[t]he law must always-already couple law *and* justice together”; taking first the contemporaneous critique of the outcome of judgement against the other, better, possibilities that it neglected:

“The absolving nature of justice remains as the inside-outside of law as in the form ... that something ‘could *have been* other than it is’ (though, regrettably, once *in* the legal procedure the moment of such absolving justice already belongs to the past)...”

¹⁰⁵ Derrida, *Archive Fever*, 71.

To this, he opposes the form of inscription of law and justice that is most readily associated with deconstruction, in which law-as-justice takes the form of

“...something that ‘could *become* other than it is’ not on the day of legal judgement, but on the ‘very last day’ (which is delayed messianic judgement that will never arrive; and which the law, in any case, cannot deliver). In this sense, justice is posed as the exhausted potentiality of the law *in* the law, reducing the bipolarity of the juridical and the non-juridical into one.”¹⁰⁶

This is precisely the form of ‘messianicity’ to which Derrida has staked a claim in contemplating the archive; and yet, Agamben argues that archaeology is capable of overstepping that ‘imperfect’ messianism and opening up the possibility of its perfection: that “to go backward through the course of history, as the archaeologist does, amounts to going back through the work of creation in order to give it back to the salvation from which it originates”¹⁰⁷

Even though justice is not in this case inscribed into the *present* law or judgement, the relationship between justice and law is nevertheless not sundered: rather, it is maintained in a way that resets the meaning of the ‘future anterior’. The latter no longer refers to a concept of justice (or authority, or memory) that is still to come; but what ‘will have been’ once the law has been fulfilled, that is to say, given over to ‘pure potentiality’ and rendered ‘inoperative’; a form of justice that maintains a relationship to the law by going *before* it ‘as such’ (in a complex trope, this messianic fulfilment of the law “brings the law to coincide with the *kaironomia* of social praxis, wherein both law and *Kairos* partake in the *nomos* of the Earth”¹⁰⁸; a real, as opposed to a virtual, state of exception that suspends the execution of the law without destroying it; that allows social praxis to reach its fulfilment – as if the law was to be entrusted wholly to the social, from which it has hitherto been separated, without attributing to the social a transcendent idea of the good or of its ends.).

The opposition between archivisation and archaeology derives from the opposition between these different moments of messianism. It follows that, in accordance with this distinction, the law of the present suffers under the weight of a ‘future anterior’ that denotes either a *fulfilment* of law in its final connection with justice or the *justice to come* of a law characterised by the force of its archival violence. That is to say, the law of the present is marked

¹⁰⁶ Zartaloudis, *Giorgio Agamben*, 289.

¹⁰⁷ Agamben, “Philosophical Archaeology,” 108.

¹⁰⁸ Zartaloudis, *Giorgio Agamben*, 300.

either by a withdrawal or a deferral; a heterogeneous and excluded part or the internal cleavage rent by death drive and prohibition. Each corresponds to either side of a distinction between messianism and the 'messianic'; they are positioned side by side along the trajectory of a complex theological history. And yet, because we are dealing with the immediacy of the present law, they contradict each other as if they were contemporaneous, each unacceptable to the other. Is it possible, however, that Agamben's movement out of the messianic and towards messianism enables the overcoming of the injunction against archaeology?

For Agamben, the use of Foucault's historical a priori is radically distinct from the 'future anteriority' of the law-as-justice, despite the fact that they share the same paradoxical grammatical structure. One is presented as the mirror image of the other, contrapuntally positioned on either side of the 'split'. This is because there are, as I have outlined above, not one but *two* moments in archaeology: the first is the summoning of the historical a priori, finding the zone of indistinction; the second is the therapeutic work of redeeming, by rendering inoperative, what has been 'saved' in the future anterior, the *archē* which one encounters as the 'moment of arising' that is not synonymous with the 'point of indistinction' at which the 'split' occurs. Let us recall that Derrida contested not only Foucault's attempt to construe an archaeology of silence, but also of reason. That is to say, he considered the later archaeology (in its nascent form) which recorded, above all else, the *conditions of possibility* of utterances, to constitute, like his former betrayal of madness in the language of reason¹⁰⁹, a betrayal of historical conditions in the language of history. Roy Boyne explains:

"For Derrida, archaeology is just another name for history and, since the historian's work is ordered and rational, history itself is an efflux of reason; reason is the condition and possibility of history. How, then, could there be a history of the conditions of possibility of history?"¹¹⁰

If Agamben's archaeology hinges first upon the exposition of the *conditions of possibility* of an historical tradition, an order, or of law itself, then this archaeology must surely constitute an iteration of historical tradition: in the nomenclature we have established throughout this chapter, must we not concede that before we can get at the messianism of the 'beyond', Agamben's archaeology requires yet another instance of *archivisation*? Does it not falter at the first hurdle? As Zartaloudis mentioned, is there not a re-instatement, even in messianism, of the *risk* of remembering and forgetting?

¹⁰⁹ The language of 'betrayal' is brought to the fore by Boyne, cf *Foucault and Derrida*, 60: "For Derrida, the only spokespeople for the mad are those who betray them... any attempt to work against reason will always be contained by reason..."

¹¹⁰ Ibid., 65.

The opposition of history to its heterogeneous ‘conditions of possibility’ in Agamben’s archaeology may give us some relief from this reduction. The suggestion that salvaging archaeology from ‘historical tradition’, from archiving and the clutches of iterative desire, is only unassailable insofar as the *conditions of possibility* of which we are constructing a ‘history’ actually *survive* the process in which they are exposed, allowing such a ‘history’ to be written. But let us recall that Agamben’s understanding of the ‘conditions of possibility’ of any order, which is to say the ‘historical a priori’, do not entail a ‘formal’ or ‘transcendent’ element capable of universalisation, of a continuity the modalities of which may be recorded in the course of a history. Instead, as Colin McQuillan explains, Agamben’s understanding of the ‘historical a priori’ is dissociated from the Kantian ‘a priori’ and takes instead the form of a heterogeneous inclusive-exclusion. Owing to this distinction, to encounter the ‘historical a priori’ of an historical tradition in Agamben’s archaeology is to *destroy* it: to render its heterogeneous elements indistinct and to displace it not with its own logic, but with its ‘moment of arising’. In the moment in which we encounter the ‘historical a priori’ *for the first time*, we must also bring its veracity to an end. It must therefore *defy* the possibility of any continuity, and therefore it escapes any effort to write a history of its modalities. It can only be shown in the course of a movement *beyond history*.

However, it is far from certain that Agamben has correctly stated the ‘historical a priori’ – at least insofar as it is used by Foucault. McQuillan argues that Agamben’s understanding of the historical a priori as a denotation of the constitutive heterogeneity is to ignore the close relationship of Foucault’s thought with Kantian philosophy – a point which Foucault has made explicit. For McQuillan, it is the Kantian ‘a priori’ that is essential for Foucault: it refers not to the condition of possibility of an order solely from within the perspective of that tradition, which in turn allows us to overcome its necessity, as Agamben would have it: rather, in Kantian fashion, it derives in its structure from the ‘transcendental a priori’, sharing in the universality of the latter but changing its nature by bracketing its ‘necessity’ in respect of its ‘contingency’¹¹¹.

Simply to retrieve Foucault’s sense of the historical a priori from Agamben’s reading does not, of course, do harm to Agamben’s thesis in any way; but it does suggest that there is an unaddressed connection between the conditions of possibility of an order and the grammatical form of the future anterior that the law, without origins, has taken in the two works under discussion. This unattended connection can be glimpsed in Agamben’s theory on the ‘signature’, in which he posits the latter as the common theme connecting his own thought to the main tenets of deconstruction and archaeology. The signature refers to an ‘excess’ of meaning, the empty signifier identified by Levi-Strauss, an outcome of the post-structural inadequacy of words

¹¹¹ McQuillan, C. “Philosophical Archaeology in Kant, Foucault, and Agamben.” *Parrhesia* No. 10 (2010), 39-49

to things, of denotation to semantics. For Derrida, explains Agamben, this excess of the signifier over the sign necessitates that “there is never any access to the realised event of meaning”¹¹²

“A signature, separated at the origin and from the origins in the position of supplement, exceeds every meaning in a ceaseless *différance* and erases its own trace in pure auto-signification”¹¹³.

The empty signifier is the space in which meaning is continuously deferred: it is the condition in which meaning is always ‘still to come’, and it lends to both law and language, as well as to the archive, its future anteriority, its character of awaiting the fulfilment of an unfulfillable promise. The signature is therefore equivalent to the ‘trace’, to the iterative movement of writing without *logos* that characterises the task of deconstruction. For Agamben, by contrast, the empty signifier is an instant of a sign ‘in force without significance’. This is the form of a ‘sign’ in the negative, that which is constitutively excluded from signification precisely in order to allow the order of denotation to function. Agamben’s closing remark in the essay is a suggestion that there may, in the future (the significance of which ought not to be lost on us), be made possible a theory that brings all signatures to their fulfilment: that is to say, one which allows us to go beyond the opposition between sign and signature in pursuance of their indistinction and fulfilment.

The parallels between the ‘empty signifier’ and the ‘future anterior’ is therefore evident in each case: meaning serves for language the same function that justice serves for law – it may be fulfilled, or promised; withdrawn or deferred. But in the midst of this study, Agamben elaborates on a third use of the ‘signature’ in the work of Foucault. He equates the signature, the ‘excess’ of meaning, to Foucault’s use of the statement – what Dreyfus and Rabinow will call the ‘serious speech act’, and which Agamben, in similar Searlean language, understands as the indication that ‘to speak is to *do* something’. In Foucault’s case, the excess of signification in the signature indicates a doubling-over of meaning: that it *means something* to have meaning. That is to say, that ordinary denotative sense is doubled over, for a particular community at a particular time, by a secondary form of signification, which is best conceptualised by the ‘seriousness’ to which Dreyfus and Rabinow refer. Certain utterances do not simply make sense to us: they have additional meaning, additional weight, owing to the circumstances in which they are uttered. This additional meaning is therefore captured in the concept of the excess signifier, or the ‘signature’ as Agamben would have it. In every other case – deferral and withdrawal – the future anteriority of *meaning* is evoked, just as the future anteriority of *law as justice* corresponds to the deferral and withdrawal of the law in the present. But with the statement-signature that occurs in Foucault,

¹¹² Agamben, “Theory of the Signature”; in Agamben, *The Signature of All Things*, supra n. 75, at 78.

¹¹³ Agamben, “Theory of the Signature,” 79.

meaning is neither deferred nor withdrawn: rather, it is *intensified* in its doubling-over, in its seriousness. The force of meaning, and by extension, of law, is in this structure neither in the form of a promise or the potentiality of fulfilment: everything happens at once, in the present; the excess has nowhere else to go, neither in the past nor in the future. Its compressed potentiality and promise is released in the same instant of its expression: we might say that its force is given as the contemporaneous *experience* of severity in relation to meaning.

We may only subject the law to critique insofar as we are able to isolate this experience; for in relation to this third version of the empty signifier, critique must proceed in the absence of the possibility of granting present denotation any future or any fulfilment; or of granting to current 'law' the promise or fulfilment of its justice. Opposing the understanding of the law of the present as a withdrawn law 'in force without significance', and which is in need of fulfilment, lies the positivist inference that every order, as we find it, is as *replete* as it shall ever be; that it cannot be contrasted to anything more essential, even if this potentiality is the technical obliteration of the very possibility of Ideality itself. Opposite the promise that defers the origin while holding it in relation to the law, stands the elimination of the *need* for the arrival of a truth that is 'to come' in the positivist containment of 'truth' within a particular context, without need for a transcendent guarantee. The third form of the 'empty signifier' must take hold of each reversal: the law, as a meaning doubled over with serious meaning, is something already-fulfilled and already-true; as both 'present' and 'correct'. However, simply because the excessive signifier in its formulation as 'seriousness' has nowhere else to go – or rather, no other *time* into which it might escape: this does not mean that it necessarily evades the grammatical structure of the future anterior. If seriousness is an 'experience' in the present for which neither the *force* of desire nor the pain of *abandonment* can account; if it is an *experience* that nevertheless informs activity, since to speak seriously is not simply to speak, but to 'do' something: then the *connection* between these higher utterances and their effects still requires to be explained. And such an explanation cannot, as we shall see, be contemporaneous with the occurrence of that connection: even though the excess of the signifier is absorbed contemporaneously into the serious utterance, the statement, or the law. For how can we be made aware of this connection without first showing it? And how can it be demonstrated as it is without knowing in advance what it is that we are looking for?

As we shall see, it will be impossible in Foucault's archaeology to analyse an historic order or discourse, which constitutes the Foucaultian 'archive', from *within the archive itself*. And thus a Foucaultian archaeology will affirm the position led by Agamben that it is not only possible but necessary, in apprehending the 'law' of the present, to get *beyond* it in a sense: to view it from a position that is outside of its grasp and from which it can no longer effect thought; and from a

time that, having recorded its occurrence, is *a posteriori* in respect of the same. And yet Agamben's understanding of the 'historical a priori' is one that destroys the activity of the 'withdrawn' excessive signifier in rendering it indistinct from signification. The case of the empty signifier as 'seriousness' is different: already commensurate with what it denotes, it cannot be rendered more indistinct from the same. And likewise, if we are to claim the status of critique for the archaeological activity in which we isolate its existence, then we must concede to Derrida's primary criticism of archaeology in general: we *are* partaking of 'history' when we isolate the seriousness of certain utterances, in the sense that we are establishing the presence of an 'archive', not only in the sense of the Foucaultian term of art (which shall be elucidated in the following chapter), but in the sense of a lived experience that remains to be accounted for, much like the *hypomnema* that tensely awaits its own discovery. Two things must be simultaneously borne in mind: first, that to *establish* an archive in this sense is not to have *created* the same; and secondly, that neither is this work of establishment a *destructive* activity. With McQuillan and Kant, we will proceed on the basis that the 'historical a priori' is more 'formal' than 'heterogeneous': it will continue in universal applicability even after our local archaeologies have come to a close. The conditions whereby every 'archive' was made possible is not in the hands of the archaeologist: they are susceptible neither to acts of creation or destruction. Thus the work of archaeology, while it entails a movement 'beyond' every 'archive', every 'experience' of seriousness, nonetheless must be taken up anew, in respect of an unceasing reiteration of such experiences in accordance with a formal law.

Finally, insofar as this third understanding of the force of law admits neither of the fulfilment of promise or of potentiality, dispelling every messianism; the archaeological method that operates upon it must also abnegate the 'call to justice' that as hitherto resided in the grammatical form of the 'future anterior' – whether as desire or fulfilment. This positivist compression of the law and its force must dissipate the ethical significance of this form of critique, since we cannot account for this force by means of a 'call to justice'. Similarly, it must curtail the political *ambition* of the method in hand – for without the opposition of the 'future anterior' fulfilment of the law to the historical a priori in which its force and significance are rendered indistinct, we would pursue only one dimension of the conditions of possibility of knowledge, without messianic imagination. Such a manoeuvre would relieve the method, as is the case in every instance of legal positivism, of the responsibility for ethics and justice. It would push this responsibility back into the sphere of politics, culminating in a potentially unbearable, even dangerous, distinction between the two spheres. It is my aim, however, to present this positivism in such a way that it can *only* operate in the service of critique *because* it serves first the purposes of political strategy.

At least, that is the theory which I shall test in Chapter Four, when Foucault's particular brand of archaeology is brought to bear on the problem of rights discourse.

Chapter Two

Archaeology, Legal Positivism and the Human Sciences

In the previous chapter, we encountered the ‘future anterior’, the grammatical form in which the law, I argued, is necessarily given. This grammatical form coincided with the theory of the signature, of which Derrida’s deconstruction and Agamben’s theological *oikonomia* represented two authoritative forms known well to critical legal thought. A third form of the signature, and with it a third venue for this grammatical form, could inhere, it was suggested, in the Foucaultian device of the ‘statement’: however, unlike deconstruction and *oikonomia*, the Foucaultian archaeological method to which the ‘statement’ belongs has not yet been placed under the rubric of legal theory. How would we effect such an emplacement? From which direction would we bring this method to bear on the law? Why might we do this, save for the sense we might feel, that there is a *gap* in the scheme of legal thought where archaeology ought to be? When speaking of the inclusion of the ‘statement’ under the heading of the ‘empty signifier’, we noted that it referred to a ‘meaning over meaning’, to the fact that in archaeological terms, to construct a statement is not just to say, but to ‘do’ something. Insofar as the statement is characterised by its *effectiveness*, the redemption of the sign would therefore be instantaneous with the emergence of the statement. One might imagine that the statement comprised a type of sign that brought together, stacked one on top of the other, the historical moments of arbitrary imposition and justification. In this compression of the future anterior into one temporal unit, the promise of the origin would be satisfied contemporaneously with the violence in light of which it is sworn; and to this extent the question of the ‘origin’ would fall away – the statement, in its effectiveness, having no need of redemption or fulfilment.

This, of course, is precisely the form of instantaneous redemption that ‘modern law’ claims for itself, divorced as it is from any dependency upon sovereign right operating in parallel with executive power. In fact, as I shall argue, the emergence of ‘law’ as an autonomous object is, as Foucault would say of the figure of Man, a very *recent* phenomenon: modern legal philosophy responded to a newfound need, in the wake of the destruction of metaphysical political guarantees, to reconcile power and justice by engendering a theory in which they would remain permanently commensurate. The efforts of legal positivism to substantiate epistemologically the ‘law object’ engendered a figure of law without want of justification or power; but this figure could only be brought into view if it was presented as comprising a coalescence of “system,” from which executive commands could derive their validity, and “legal norms,” in which those

erstwhile “commands” could be represented as objects invested with right. This commensurability of norm and system would therefore perform the role of holding together power and authority at every moment of executive action. Now, there are various critical means by which to break open such configurations of law as norm-and-system – they are reproached for the logical or normative excesses at their epistemological apex, or for their dependency on some form of ‘supplement’ in the last instance, in which their secret appeal to origins is unveiled. The putative value of this configuration, however, is that it ensures that the legal system need not make any appeal to an original moment, finding the source for its own authority always-already contained within itself.

The instantaneous folding-over of power and justification can be schematised, ostensibly, in this configuration of “system and norm”. The latter resembles very closely the structure of the human sciences, which emerge in the history of thought in response to that other novel object, “Man”, in the wake of the breakup of Classical configurations of science and philosophy. In these sciences, Man is shown to make representations of certain delimiting aspects of his lived experience or environment to himself by virtue of the systems, functions, conflicts in which he engages in the course of that experience. These representations are not consciously made; but they nevertheless engender new objects out of the putative delimitations that face Man – for example in the context of a language which he does not master, Man may represent to himself a set of meaning-objects, of which he has no conscious awareness, through his use of a system of significations of which he may not be fully aware, but which the human sciences can describe and bring to knowledge in order to account for those unconscious representations. In the course of this chapter, I will aim to draw out the parallels between this duality of unconscious representation and the organising principles by which they are obtained in the human sciences and the efforts of legal positivism to ground the representation of power as ‘norm’ in the organising principle of the legal system that the legal science brings to knowledge. And I will attempt to show that the (certainly unconscious) efforts of legal positivism to emulate this human scientific objective of ‘representation’ will forever be frustrated by virtue of the fact that no such system, no organising principle, is capable of accounting for the ‘representation’ of power as ‘legal norm’, insofar as the latter must always be arbitrary, and to posit it in the unconscious as such would be to suggest that it engendered a political, as well as a philosophical, form of self-determination.

But that legal positivism, insofar as it emulates the human sciences, should be unable to obtain a grasp of the ‘law object’ engendered in the insurgence of *modernity*, should not suggest that there is no possibility of obtaining a ‘law object’ of another form, of conducting a legal

positivism that operates in much the same manner, but which takes pains to divorce itself quite deliberately from the human sciences, from their objectives and their form. I am speaking, of course, of the archaeological method, which attributes to the human sciences an at least “*de facto* privilege” as an area of study¹¹⁴. Like legal positivism, archaeology seeks out not just meaning, but forceful meaning – the super-linguistic object of the ‘statement’ – and inquires as to its mode of existence: implying, that is, that a certain utterance or set of signs backed by what would otherwise be ‘power’ can be sustained as self-evidently ‘serious’ pronouncements under certain circumstances. Like legal positivism and the human sciences, archaeology sets out to account for those statements by virtue of announcing their belonging to a system in which they enjoy their special form of signification; by the execution of an historical process in which we bring incrementally to knowledge the state of that system from which they derive their substance – if not their *force*. In archaeology, I will suggest, we find an alternative modality of the ‘law of law’ sought out by legal positivists in response to the problem of “modernity”: an alternative route to accounting for the self-sufficiency of serious pronouncements, of presenting the coincidence of power and right, of the arbitrary exercise of force and its justification. Unlike legal positivism, the archaeology will not seek out the conditions of possibility, of validity, for normative utterances but rather, treating those utterances as facts, as ‘statements’, the historical limits, the discursive “conditions” of their *existence*.

The efforts in modernity to bring the ‘law’ into sight by virtue of its belonging to a system, while still doing justice to its arbitrary nature, is nothing more or less than a symptom, a misdirected reflex, of specifically liberal ideology in the face of political power. Or so I argue – not because this has not been suggested before (far from it); but rather, to suggest that in posing the problem as one of ‘law and the human sciences’ instead of ‘ideology’ *simpliciter*, we can imagine that the retinue of resources with which we might imagine the ‘law object’ is not *exhausted* with positivist jurisprudence. It is simply the case that the human sciences, positivist jurisprudence, modernity itself – is asking a question that it cannot answer; since it is trying in essence to bring together the two aspects of the grammatical form of the law, which will always escape one from the other insofar as we are concerned with the possibility of representation alone – when we are concerned to defend, that is, the fact of legitimacy. But when we shift our concern from the ‘norm’ to the ‘statement’, the fact of legitimacy is taken for granted, bracketed, neither believed nor disparaged: it is its historical conditionality that comes to the fore, its arbitrary nature delineated by the fact that ‘discourse has a history’ and thus the system to which any statement belongs is afflicted by its own lack of universality, its historical contingency. The

¹¹⁴ Foucault, *Archaeology of Knowledge*, trans. A.M. Sheridan Smith (2002) (Abingdon, Routledge Classics) 33.

device that reveals this historical contingency, while nevertheless inscribing the strength of the conditions under which the ‘statement’ has its force within that history, is the archaeological device, rescued from its misuse by Agamben¹¹⁵, of the ‘historical *a priori*’. It is also the figure in which we might re-imagine the possibility of a ‘law of law’.

The Beginnings of Archaeology: The Problem of Man

If Foucault’s earliest ‘archaeology of silence’ concerned the interaction between the language of reason and that of the madman; if it was concerned with the instances in which certain types of speech were *excluded*, even ‘constitutively’ so, from politics, science and the very rational part of human thought: the later archaeology, in the form that we understand it today, took up a very different question. In an interview on the occasion of the publication of *The Order of Things*, Foucault contrasted the nascent methodology of that work with his previous approach to madness: whereas “*Madness and Civilisation*, roughly speaking, was the history of a division, the history above all of a certain break that every society finds itself obliged to make”, namely the constitutive heterogeneity, or the internal cleavage – whichever we choose to believe – between reason and its Other; in the 1966 book, Foucault now set out “to write a history of order, to state how a society reflects upon resemblances among things and how differences between things can be mastered, organised into networks, sketched out according to rational schemes”¹¹⁶. Instead of focussing on the internal exclusions constitutively germane to each discourse, each unit of sense or knowledge, the scope of analysis in *The Order of Things* switches up a level to encounter the interaction of these discourses, the manner in which, “in a society, different bodies of learning, philosophical ideas, everyday opinions, but also institutions, commercial practices and police activities, mores – all refer to a certain implicit knowledge [*savoir*] special to this society”¹¹⁷. From the local to the social; from the speech of the subject to the knowledge-*savoir* of a society: whereas “*Madness and Civilisation* is the history of difference, *The Order of Things* [is] the history of resemblance, sameness and identity”¹¹⁸. The special significance of this ‘history of the Same’ will be addressed in more detail shortly: what is distinctive for now is that, in an attempt to find unity beyond instances of exclusion, Foucault is broadening the scale of his research, we might say (with words that must be approached with caution) from the level of ‘local’ to that of

¹¹⁵ See e.g. McQuillan, C. “Philosophical Archaeology in Kant, Foucault, and Agamben” discussed in Chapter 1.

¹¹⁶ Foucault, M. “Order of Things”, in Foucault, M and Faubion, J (ed) *Aesthetics, Method, and Epistemology*, trans. R. Hurley et al. *Essential Works of Foucault 1954-1984* Vol. 2 (2000) (Penguin Books) 261.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

the 'social'; from 'discourse' to 'order'. But at the same time, Foucault insists, it is also a history that deliberately avoids the extant unities used in other discourses, sciences and forms of logic to group phenomena together: we must not rely upon these pre-given unities, warns Foucault; rather, we must consider them to be objects of analysis like any other, taking care not to "establish any differences a priori". As a preliminary matter, then, this 'history of the Same' is not a history that sets out to look for the recurrence of a pre-given object or theme; it does not treat the groups and categories that it discovers seriously, it does not give any 'truth' to the element of the 'Same' that it might discover; it does not proceed forearmed with the knowledge of what it is looking for. Rather, it is a history of *how* things are categorised together, brought together under certain headings and distinctions, made to function together at a given time.

It is in this vein that Foucault approaches his primary object: the human sciences. *The Order of Things* is a long, complex work in the duration of which three unities of "order," what Foucault refers to as *episteme*, beginning in the sixteenth century, are established by virtue of the differences between them: the Renaissance, in which the organising principle pertaining to order entailed the 'similitude' between things, between the heavens and the earth, plants and the body, and so on; the Classical age in which taxonomical representation took the form of organisation in the study of life, of economy and needs and most importantly, in language, which for the age of representation "acquires a being proper to itself"¹¹⁹. The breakdown of the age of representation saw the emergence of the final *episteme*, that to which we belong: the age of Man. In this *episteme*, under which Western thought continues to labour, Man becomes both the object of knowledge and the subject from which this knowledge arises. In contradistinction to the 'representational' ordering of knowledge in the Classical era, in which words could be considered adequate to the things they described by virtue of the centrality of the *cogito* on which that representation could be grounded, in the age of Man the place on which knowledge is grounded becomes unstable. If, for example, Descartes' *cogito* could be sure of its own being because of its certainty of a world in existence over and above himself, it was owing to the retention of metaphysics, to the fact that the source from which knowledge was analysed was not at the same time the place from which it was given. Language itself served the function of representing things by means of words, and this representation was unproblematically executed by language. However, towards the end of the eighteenth century, the knower-*cogito* no longer served its function in respect of an already-constituted world in which he was simply an object among others, and of which he was only the interpreter and not the source. As the eighteenth century draws to a close, explains Foucault, Man enters the scene of representation in the position of the

¹¹⁹ Foucault, *The Order of Things: An Archaeology of the Human Sciences*, (2002) (Abingdon, Routledge Classics) 322.

sovereign. Representation now becomes problematic, for the world can only come into knowledge through the cognition of the knowing subject, who in turn is also an object of knowledge; and so, absent the ineffable transcendence of a God or of first principles, whatever postulations he puts forward about the world are subject to the fact that their source, Man, is subject to a series of limitations, a finitude.

“It is now no longer their identity that beings manifest in representation, but the external relation they establish with the human being. The latter, with his own being, with his power to present himself with representations, arises in a space hollowed out by living beings, objects of exchange, and words...”¹²⁰

In this hollow space, the figure of Man encounters those things that impose limitations upon him: his anatomy, needs, the density of his language. However, this finitude is not a *finishing*: it is not the end, once and for all, of knowledge. Rather, “it indicates the monotony of a journey which, though it probably has no end, is nevertheless perhaps without hope”¹²¹: in what Dreyfus and Rabinow refer to as a “startling inversion”, Man’s limitations are also positioned in this new epoch as the very conditions of his knowledge, to the effect that Man appears as an “enslaved sovereign”, whose “threefold limitations” – the empirical, the unthought and the origin – correspond to threefold conditions of knowledge – the transcendental, the *cogito* and the ‘return’ of that origin. These limitations and conditions are intertwined in what Foucault refers to as the ‘analytic of finitude’, which operates, to put it very basically, thus: Man “is a being such that knowledge will be attained in him of what renders all knowledge possible”¹²²; at the primary level, knowledge of the empirical world is given by experience, and yet this experience is only articulable by virtue of transcendental forms of knowledge – which in turn are subject to further empirical determination, either by the senses, or by the history of perception. In the second instance, the *cogito* stands in opposition to the ‘unthought’ as Man’s reflections on his own being are confronted by modalities of thought over which he is *not* ‘sovereign’: “a language which he does not master... a living organism he does not fully penetrate with thought, and the desires that he cannot control must be taken to be the basis of his ability to think and act”¹²³. Finally, the figure of Man is confronted by his history: unable to determine for certain the moment in which he “begins” – unable to pinpoint his own origin, that is, with any certainty – he must construct for himself a history, stemming from his own thought, which nevertheless has a beginning of its

¹²⁰ Ibid., 341.

¹²¹ Ibid., 342.

¹²² Ibid., 347.

¹²³ Dreyfus, H and Rabinow, P, *Michel Foucault: Beyond Structuralism and Hermeneutics*, (1982) (University of Chicago Press), 35.

own within the temporality of his own lived experience. In this way, “man finds himself fundamentally set back in relation to that setting back of things” – including any setting back of himself as an object of history.

Since the figure of Man constitutes a complex oscillation between the positive and the fundamental, the demise of the Classical modality of representation similarly takes a toll on the sciences. While ‘science’ and ‘philosophy’ could be technically discerned in the Classical age, because representation formed the epistemic modality of all knowledge, there was no real cleavage between the act of analysis and the act of observation, since the *cogito* operated in the midst of a world that was already given. With metaphysics still alive and well, the task of knowledge-as-representation was to classify into a colossal taxonomy the great continuity of nature. “This, no doubt,” says Foucault, “is why natural history, in the Classical period, cannot be established as biology. Up to the end of the eighteenth century, in fact, life does not exist: only living beings”¹²⁴. And so sciences were grounded on the adequacy of language and thought to represent “the universal distribution of beings” into a taxonomy: “minerals...vegetables...and animals”; and at the same time the representative capacity of the *cogito* is guaranteed its certainty by this very world in which it only plays a thinking part: without the burden of the ‘sovereignty of knowledge’, it would not require to conduct an epistemological analysis of its own adequacy to this task. Mark Cousins and Athar Hussain contend that that “the radical implications of Foucault’s argument is that there was, in the Classical episteme, no ‘philosophy’ as such”¹²⁵; but that with the breakup of the Classical episteme “the knowledges of life, labour and language had ceased to be encapsulated by representations”¹²⁶, giving way to an opposition between empirical science on one hand, and epistemology, and with it ‘philosophy’ proper, on the other. Indeed, Foucault explains that the human sciences are caught in a “double and inevitable contestation: that which lies at the root of the perpetual controversy between the sciences of man and the sciences proper ... and that which lies at the root of the endless controversy between philosophy, which objects to the naivete with which the human sciences try to provide their own foundation, and those same human sciences which claim as their rightful object what would formerly have constituted the domain of philosophy”¹²⁷. It is in this cleavage, according to Coussins and Hussain, between the empirical sciences and philosophy, newly minted and separated in the absence of omniscient taxonomical ‘representation’, that the “sciences of man,” unthinkable in the Classical episteme, are situated.

¹²⁴ Foucault, *The Order of Things*, 175.

¹²⁵ Cousins, M and Hussain, A *Michel Foucault*, (1984) (Basingstoke, Macmillan) 48.

¹²⁶ *Ibid.*, 49.

¹²⁷ Foucault, *The Order of Things*, 377.

These peculiar “sciences” possess a twofold significance. First, they carve out a space in which the conditions of Man’s thought, which continuously elude him, can be brought, in certain circumstances, back under his control. Secondly, they do so in a way that sutures the schism between the positive and the fundamental, the empirical and the transcendental; they replace the lost function of ‘representation’ – albeit, say Cousins and Hussain, in a different sense from the ‘representation’ of the Classical age. This new function entails but is not limited to a form of “representation as knowledge”, which includes “both knowledge of that which is given to consciousness and the analysis of what, in escaping consciousness, can be recouped by the knowledge that is the human sciences”¹²⁸. In short, the human sciences are capable of giving substance to a form of the ‘unthought’ on the basis of which certain types of thought are based; what the authors describe as “the analysis of knowledge (consciousness) by reference to further knowledge (the unconscious) by means of knowledge (the human sciences)”¹²⁹. On one hand, the human sciences proceed by using models “borrowed from” the positive sciences of “biology, economics and the sciences of language,”¹³⁰; on the other, they also “address themselves to that mode of being of man which philosophy is attempting to conceive at the level of radical finitude, whereas their aim is to traverse all its empirical manifestations”¹³¹. The human sciences encountered by Foucault relate to the same subjects of life, labour and language that allow him to systematise the whole study: against biology there appears the human science of psychology, in which the physical and social delimitations of man are encountered by “that living being who, from within the life to which he entirely belongs...constitutes representations by means of which he lives, and on the basis of which he possesses that strange capacity of being able to represent to himself precisely that life”¹³². Likewise for economics, which corresponds to the human science of sociology in which “groups represent to themselves the partners with whom they exchange”¹³³; and language, opposite the study of literature and myth, in which “an attempt is made to define the way in which individuals or groups represent words to themselves”¹³⁴. These “sciences” proceed by constructing a set of ‘representations’, the objects of their science, against the background of the unthought, using the models borrowed from the empirical sciences; which emerge in the human sciences as a tripartite set of functional pairings: “function and norm”, “conflict and rule”; and “signification and system”. The former component of each pair refers to a modality of representation given in psychology, sociology and literary analysis respectively; and

¹²⁸ Cousins and Hussain, *Michel Foucault*, 60.

¹²⁹ Ibid.

¹³⁰ Foucault, *The Order of Things*, 379.

¹³¹ Ibid.

¹³² Ibid., 384.

¹³³ Ibid.

¹³⁴ Ibid., 385.

the latter to the conditions under which that ‘unthought’ representation is made possible. For example, in the case of mythology, the meaning of certain words and traces can be accounted for as so many ‘representations’ by virtue of their belonging to a system of use. As Cousins and Hussain explain:

“Function, conflict and signification are categories by which life, labour and language can be represented in knowledge (and as knowledge) without passing through consciousness. Thus norms, rules and systems can be represented as governing consciousness but not as being given to it spontaneously. They are accessible only through the reflexive knowledge of the social sciences.”¹³⁵

To take the example of system-signification, then: the system ‘governs consciousness’ but is not ‘given to it spontaneously’; but out of the use of this system Man can give to himself representations in the form of significations, of which he is not properly ‘conscious’. It is down to the operation of the human science to lead the suggestion that the system in question *exists* for the living being; but that it is accessible to *reflexive* knowledge only once it is revealed by the human science. Thus the age of Man acquires a means of bringing to certainty aspects of his life that would otherwise escape his own knowledge. Foucault’s archaeological work is concerned in the main with the overcoming of the age of Man: the final stages of the latter is, he suggests, already underway by virtue of the introduction of radical ‘countersciences’ to which his own archaeological method will be closely related. These sciences undermine the age of man by interrupting the representational force of the human sciences, exposing, for example, the emptiness of the origins that coincide with the human scientific study of signification as myth; such, too, is the vulnerability of a theory that posits ‘law’ as a representation grounded in a system of validity that could be brought, reflexively, to knowledge.

Law and the Human Sciences

Without too much speculation, one might suggest that the human sciences, in the sense that they are presented above, can be connected to ‘law’ by virtue of a shift in approach, between the Classical episteme and the modern, to the adequacy of political power to ‘right’. In the Classical episteme, just as representation secured the adequacy of words and things in the branches of thought concerned with life, labour and language, there was, in political theory, a reflection of this adequacy insofar as might coincided with right, political power with authority. In the

¹³⁵ Cousins and Hussain, *Michel Foucault*, 65.

seventeenth century precursors to modern political theory, the question of ‘law’ was never raised: The sovereign could adequately represent his subjects, for whatever means justified in political theory: and thus the decrees handed down by political power were understood uniformly by political theories to have force – it was only the characterisation of that political power that was called into question at the time. With the revolutions of the late eighteenth century and the ingress of the Enlightenment, however, the adequacy of power and right came into question. As the empirical departed from transcendence in science and philosophy, so too did ‘representation’ cease to function in the political domain. The introduction in republican political thought of a tension between constituent and constituted power disrupted once and for all the representative capacity of sovereign power, bringing the inadequacy of political power and ‘right’ into relief, and subjecting the self-evidence of the legal order to the aporia of sovereignty. In the nineteenth century the derivation of law from sovereign power would become systematised in the work of John Austin; opposite the development of the nascent human sciences on the continent¹³⁶; and this formulation of legal science would endure, as we know, until the political exigencies of the twentieth century gave rise to the need for a reinstatement of “law” in its own right. In the breakdown of representation, and with it the proliferation of the aporetic tension between the empirical and the transcendental, and by extension between the exercise of power and its legitimacy as the tension between constituent and constituted power, there arose the same lack of representational adequacy as that encountered between the empirical sciences and philosophy – between fact, that is, and the epistemological devices that could be used to ground those facts as ‘truth’. If the human sciences arrested the latter tension in the context of life, labour and language by reinstating the aspect of ‘representation’ lost to the Classical age, it is not beyond the realm of possibilities that a similar need for representation would arise to placate the political excesses of the tension between power and right.

And this, although it is not generally acknowledged to be the case, is what one might claim for the emergence of modern legal positivism. It is not simply to denote, as our history would have it, that the ‘Rule of Law’ is a modern problem: the law *itself* is an object peculiar to the age of Man. Or at least, the law-object, an autonomous and unified entity, only emerges in light of the need to reinstate the adequacy of political power and right; it only exists in the space opened up for representation by the insuperable schism between the two. There emerges, for example, in the twentieth century, and for the first time, theories that are not content to answer the question of the essence or consistency of law by reference to anything external to ‘law’. These theorists would not, of course, understand their own work as constituting any such effort

¹³⁶ Comte’s sociology was published within months of Austin’s *Province of Jurisprudence Determined*.

to ameliorate the representational 'lack' of power in modernity. In an overview of the emergence of post-Austinian legal positivism, Roger Cotterrell explains the existence of the empirical-transcendental tension not in the context of politics, but of theoretical approach: the tension between an 'empiricism' on one hand and what Cotterrell calls 'conceptualism' (that is, the analytical use of *a priori* concepts) stems, "unfruitfully," from debates over the nature Austin's work but also usefully exemplifies in dichotomous tension the approaches to legal positivism in the work of H.L.A. Hart and Hans Kelsen respectively¹³⁷. This is to suggest that, instead of ameliorating a political tension, these particular branches of positivism which, more prominently than any other, sought to delineate the law without reference to the extra-legal tropes of power and morality, and to provide an account of 'law' that would emerge from within its own autonomous context, simply opted to develop a theory along one side of this tension or the other. The existence of law, in other words, is taken for granted in each case and requires no theoretical exertion in the name of bringing it into being as an object of analysis.

But this is precisely the point. It is in the nature of the human sciences, explains Foucault, that they will assume the existence of their object, which is also their condition. The existence of a 'law object' capable of operating upon power in the last instance is always dependent upon the capacity of any jurisprudence to account for the self-evidence of that object. This is usually attempted by placing the latter in the context of a 'system' in which it is said to inhere as a matter of fact; and yet any such "fact" is only truly discernible through the machinations of theory, the purpose of which is to establish this system, be it by drawing it out of real, apparently reflexive, legal practices; or even by constituting it outright. For example, in the earlier versions of the *Pure Theory of Law*, Kelsen embraced the idea that the system of legal validity was epistemologically derivative of legal science.

Logic and Ontology in the Pure Theory of Law

Throughout its various phases and versions over the course of three decades, the significance of the Pure Theory lay in the fact that it raised the possibility of a theory of law in which the latter constituted its own foundations; namely by means of the derivation of lower legal norms from higher legal norms: in the original version of the Pure Theory this system was epistemologically guaranteed by the purity of a legal science which would, in the same vein as the Kantian understanding of natural sciences which 'transform' empirical phenomena into objects of

¹³⁷ Cotterrell, R *The Politics of Jurisprudence: a Critical Introduction to Legal Philosophy*, 2nd Edition (2003) (London, LexisNexis) 83.

knowledge, ‘create’ the object of law by observing the operation of its system. While this approach would in any case engender the demand for an epistemological commitment to the systemic nature of the law – thus rupturing the sense of self-creating law and bringing it back into the frame of a normative ideal¹³⁸ – it was, in any case, abandoned¹³⁹; in his later works, the idea that the science of law creates its object has disappeared. In the absence of this link between science and system, the theory of law is wholly descriptive: therefore the burden appears to rest on the *world* to produce the systematicity for which the theory sets out to account; and whereby the law can provide its own foundations. But the empirical facts discoverable in the world are far from compliant with the needs of a pure theory of law: the legal ‘norm,’ like the system to which it belongs, defies self-evidence. How else can this theory carry a descriptive function unless it is in relation to an “unthought” category upon which it must insist? In the interests of analysing legal positivist attempts to ‘represent’ the law, I wish to put forward two claims about Kelsen: first, that the evolving Pure Theory sets out in the direction of the human sciences, even if unwittingly; and secondly, that it is precisely owing to this ‘human scientific’ attitude that the Pure Theory encounters an insurmountable tension, which may be broken down into three parts. The first concerns the arbitrary nature of the legal norm; the second, the opposition of ‘logic’ to the structure of ‘validity’, the latter alone being suitable for the character of legal norms; while the third, which characterises the most serious and arguably insurmountable tension in the Pure Theory, puts forth the problem of reconciling the nature of legal norm, together with the corresponding constraints on the modality of the system to which it can belong (that is, Kelsen’s eschewal of ‘logic’ in the context of law), with the need to account for a self-creating, and thus self-deriving, system of norms.

Michael Hartney’s introduction to the English translation of Kelsen’s last work, *General Theory of Norms*, provides an illuminating retrospective over the whole of his *oeuvre*, especially concerning the evolution of these tensions¹⁴⁰ The first version of the Pure Theory, he explains,

¹³⁸ cf Minkkinen, P “Why Is Law a Normative Discipline? On Hans Kelsen's 'Normology'” *Res Publica*, Vol. 11 (3) (2005) 235-249

¹³⁹ cf Kletzer, C “Kelsen, Sander, and the Gegenstandsproblem of Legal Science.” 12 *German L.J.* 785 (2011)

¹⁴⁰ I will follow his narrative, notwithstanding that it is not immune to criticism by the Kelsenian cognoscenti – the point is to demonstrate the tensions that recur throughout his works, in light of Hartney’s own important insight concerning the distinction between the meaning and existence of norms. His introduction is held in one review to be an “important contribution to jurisprudential scholarship in its own right”. Nigel Simmonds holds here that “Hartney skilfully puts his finger on a feature that seems to inform much of the elderly Kelsen’s argument: the conflation of norms as meanings having logical properties with norms as entities having a contingent temporal existence”. Simmonds also makes the connection between the will-theory of norms pursued in *General Theory of Norms* and the presentation of “a striking picture of the legal order as a pure structure of power and authorisation. Interestingly, he adds: “The vision is one that has many evocations for us, in the connections between value-neutrality and instrumental reason from Weber to the Frankfurt school; and in the discovery of power throughout the social micro-structure in the jurisprudential analyses of Cohen and Hale and the enigmatic reflections of

concerns the making of a distinction between dynamic and static systems of norms¹⁴¹: in static systems, there is a logical inference from higher to lower norms; whereas in a dynamic system like law, a higher norm must first *create* the lower. In this first version, the nature of the norm is unclear. They are on the one hand ‘sentences’ the content of which can conflict; on the other hand they appear as entities, “things which have some sort of contingent existence...not natural objects, but ‘meanings’”¹⁴². This conflation gives rise to a dichotomy that will permeate, says Hartney, the entirety of Kelsen’s work: “There are two sets of claims about legal norms which must be reconciled: those which imply that a norm is a sentence, in particular those claims about its logical features, and those which imply that it is a sort of entity which begins and ceases to exist”¹⁴³ – the latter being the case by virtue of the fact that norms are brought into existence by legal acts: they are not ‘natural facts’. Just, explains Hartney, as a belief is ‘time bound’ and relative to the mental attitude of a particular person, and so contrasted to a logical proposition that is timeless, following the course of logic (and thus stemming, Platonically, from the truth of a highest Idea); so too does the idea of a contingent entity, the ‘norm’, conflict with the idea that it must also be systemically emplaced in respect of the sense of its content¹⁴⁴: “This is what happens with Kelsen’s concept of a norm: it conflates the time-bound and system-relative entity with the logical content of this entity.”¹⁴⁵

Thus, in the first version of the Pure Theory, “Kelsen assumes without any argument that one norm can be ‘deduced’ or ‘derived’ from another.”¹⁴⁶ But this is on the basis of an unacceptable conflation, explains Hartney, of meaning and being. We could extend Hartney’s observation to the roots of this very problem in general, that is to say to the conflict between the Sophist poets and the Platonic (or Socratic) tradition: the Sophist opposition of “truth value” of statements-as-entities which may interact with each other in the most absurd ways; and the linearity of truth deriving from the *logos* that persistently legislates the truth of every subsequent statement, which must at all times be derivative of this highest idea. But why should we agonise over the distinction between logical and legal systems anyway? What are the stakes? By the second edition of *Pure Theory of Law*, some greater insight is made into the need to eschew the logical systematisation of propositions: the ‘norm’ is now given a determinate definition, as the

Foucault.” Simmonds, N “Review: General Theory of Norms. By Hans Kelsen. Translated by Michael Hartney.” The Cambridge Law Journal Vol 51 (3) (1992) 542-545, at 544–45.

¹⁴¹ Hartney, M “Introduction: The Final Form of the Pure Theory of Law” in Kelsen, H *General Theory of Norms*, trans M. Hartney, (1990) (Oxford, Clarendon), xxiii.

¹⁴² Hartney, “Introduction,” xxiv.

¹⁴³ Ibid.

¹⁴⁴ For example, the higher norm has a meaning that creates the lower norm; and no two valid norms can conflict.

¹⁴⁵ Hartney, “Introduction,” xxiv.

¹⁴⁶ Ibid., xxvi.

‘meaning of an act of will’¹⁴⁷. From here, norms (the *sollen*-sentence) are distinguished from propositions concerning norms as the opposition between a statement that has no ‘truth value’ of its own (“A is to do B”), as against the statements which describe such statements, which take the form “there exists a norm that A is to do B”¹⁴⁸. The latter belong to the descriptive domain of legal science, now stripped of its Kantian significance. Which leaves in turn the problem of rendering statements of the first kind, norms, into a systemic unity. As Hartney explains, there is posed in the second edition a formulation whereby “since propositions of law are clearly subject to logic (as they are propositions or statements), and since there is a proposition of law for each legal norm, the principles of logic which apply to the propositions of law can then be said to apply *indirectly* to the legal norms themselves”¹⁴⁹. However, in this formation, “there is no way of knowing what the logic of these propositions is until we know the existence-conditions of the norms”¹⁵⁰. And so this derivation is ‘getting things backwards’, in Hartney’s summation¹⁵¹ (beneath this, can we not glimpse yet another instance of the grammatical form of the future anterior?).

By the fourth instalment of the Pure Theory, the *General Theory of Norms* (the book in hand for Hartney), the definition of the norm as the ‘meaning of an act of will’ is elaborated upon, with the distinction being underlined between an ‘act of will’ and an ‘act of thought’, both of which are mental acts. From Kelsen’s theory of language and mind, elaborated in this fourth work, it is surmised: “Language serves to express publicly the meanings of one’s mental acts. Thus an utterance is a statement when it expresses a mental statement, and a norm when it expresses a mental norm”¹⁵². And so we find in the whole litany of things that are said a distinction between mere sentences and ‘norms’; and that these norms are contingent upon mental ‘acts’, the act of the person doing the willing. If the norm is the meaning of an act of will, this can only be the subjective meaning given to it by the one whose will it represents. The break between the discrete character of the norm and the universality of language comes into play for Hartney, for the way of ‘knowledging’ (I use the same term as Cousins and Hussain) that meaning is *only accessible through language*. There must be some suspension of disbelief, surely, on the part of the theorist insofar as a distinction is going to be made between language-representing-statements (ordinary acts of thought) and language-representing-norms? How are we to distinguish one from the other? One way of circumventing this difficulty would be to

¹⁴⁷ Ibid., xxxii.

¹⁴⁸ Ibid., xxxiii.

¹⁴⁹ Ibid., xxxvi.

¹⁵⁰ Ibid., xxxvi–xxxvii.

¹⁵¹ Ibid., xxxvii.

¹⁵² Ibid., xxxviii.

claim that a “norm” is more than a *mere* “statement”, in a manner similar to the empty signifier – it is meaning beyond sense-meaning, beyond interpretive or linguistic meaning.

But if we are to extend that definition of certain norms to all possible norms, regardless of their inclusion in a legal system, this would be to contradict the “long-standing claim that a command gives rise to a norm only if the commander has norm-creating power in virtue of another norm. For if every act of will directed to the behaviour of another produces a norm, then the highwayman’s act of will produces a norm ‘Hand over your money!’”¹⁵³. The arbitrary exercise of only *certain forms of power* is to be given representation as ‘law’ in the system of legal validity; we cannot proceed from the definition of a norm, but from its criteria of validity. The ideological implications of a Pure Theory begin to seep through insofar as it becomes frustrated by the demand to determine “*which* norms?” By this point, Kelsen has made it clear that the rules of logic *cannot* apply to norms as they do to propositional sentences: truth is distinguished from validity on the basis that truth is the property of a statement, while validity is the very existence of a norm. The systemic self-grounding of the law is rounded off by bridging, asymptotically, the gap between general norms and particular norms that are now connected by ‘acts of will’, which occur iteratively, as opposed to derivatively from a first and ideal interpretation. Norms are not considered for their negative or proscriptive function on the conduct of individuals; rather for their power-conferring function in the event of certain behaviours in individuals. It is not that a norm states “do not do A”, but rather, “If someone does A, then B will occur”. In this sense, it appears that Kelsen is bridging the need for logical deduction with the iterative occurrence of power-conferring acts of will¹⁵⁴, thus evading the need for logical deduction. This is problematic for Hartney not only because, regardless of the power-conferring nature of the norm, it must always hark back to a general proscription that sets in motion the “if-then” chain of power-conferring acts of will. Such an approach also has the effect, however, of requiring that we systematise valid norms *after the fact* of their validity. No small degree of presupposition over the meaningfulness of mental acts of will is involved here: the thesis operates on the basis that these mental acts of will can be, and will be, accepted at face value. In short that the act of will in question is always-already meaningful: that it has the effect that we think that it has. How else does one schematise the cogency of such a system without giving those acts of will their own scheme of representation?

Hartney is not suggesting that Kelsen must reinstate logic into the system of norms, with all of the consequences that this would entail: this would be disastrous indeed for the effort of law to provide for its own self-creation. Rather, the central difficulty lies in the question, ignored

¹⁵³ Ibid., xxxix.

¹⁵⁴ Ibid., l.

by Kelsen, over whether the norm is a “kind of sentence” or a “contingent entity created and repealed by certain social events”¹⁵⁵. This is the fault line that permeates all of Kelsen’s work and which ultimately frustrates his project: the failure to distinguish between norms as sentences (with linguistic meaning and therefore propositional significance giving rise to logical deduction) and norms as contingent entities (which would engender an ontology of norms, concerning, precisely (this shall become important in the next section) their “conditions of existence”). If what Hartney presents is an *insurmountable* dichotomy into which the Pure Theory cannot but fall in the search for cogency; if, in the last instance, we must oppose two distinct analyses of a legal system – one concerning its normative or logical form; the other concerning its ‘conditions of existence’: what must this imply for the overarching aim, ideological and scientific, of the Pure Theory?

The need to separate the ‘act of will’ from meaning in general is occasioned by the intractable arbitrariness of the norm; and yet the need to separate norms from propositions in turn demands the presence of a supplement to take the place of logic in order to give them their force, their (contextual) ‘truth’. The schism enacted between one *type* of meaning (‘norm’) and general meaning (sense) engenders the difficulty of rendering what is arbitrary and subjective in its nature as social and universal in its effect. In the absence of any engagement with the ‘empty signifier’, as one would find in self-avowed theories of the ‘supplement’, this nevertheless extraordinary norm-meaning dwells in the abyss between the subjective (the meaning for he whose act of will it is) and the objective (whereby we can say that it *has created* the validity of the norm that results therefrom and which, expressed by language, is available to us). And if in the last instance the whole system is prompted by a fictitious first norm; if this initial moment is not a logical Idea that can be articulated but a ‘presupposition’ of another kind, then every moment of the system is an inflection of this always-already enacted ‘mental act of will’: the whole system, in other words, corresponds to a ‘mythologeme’ which covers a void (in Agamben’s words) or a future anterior (in Derrida’s) promising that the unthought element of the norm that resides between logic and ontology can be brought to knowledge.

The Pure Theory behaves much like a human science and fails to ground the law-object in the last instance owing to this insurmountable void between logic and being. We have seen already the effect of reducing the pure theory to the side of logic (indeed, it is a theme in common between Kelsen and Foucault, in Minkkinen’s view). Once again, however, we are left with an untouched remainder: Hartney’s allusion, mentioned earlier, to a theory of the ‘conditions of existence’ of norms. If ‘logic’ will not give us a self-grounding theory of law, but

¹⁵⁵ Ibid., xliii.

one that always invokes the Idea, the normative ground for the theory itself; what might be said of the other side of this dichotomy? Is there any promise, we might wonder, in this untreated remnant of a difficult positivism? Might it point towards another version of a self-sufficient theory of law?

Myth and Sociology in the Concept of Law

The link between positivism and the human sciences is perhaps more clearly discernible in the strategy adopted by Hart to discern the ‘concept’ of law¹⁵⁶. Hart’s “positivism” is motivated less by an ostensibly ancient, almost apophatic, philosophical sense of a self-creating system of rules (as is the case for Kelsen) and more by the need to redeem our understanding of law from hitherto unhelpful approximations of the same: in particular it is his aim to free the concept of law from its reduction to the command of a sovereign and to differentiate the legal norm from moral norms on one hand and the type of ‘obligation’ that responds to threats on the other. The extent to which Hart can answer this question, and to which he can provide a workable concept of law, depends upon an ancillary elaboration of a *normative legal theory*. From the outset, the consistency of this approach is threatened on one front by its proximity to the human sciences: insofar as “the concepts that he seeks to link theoretically are to be drawn from actual experience or observation of law”¹⁵⁷, Roger Cotterrell suggests that there is a ‘sociological drift’ in Hart’s theory: for any such observation cannot but be a report on how people actually talk and think, and “such an inquiry is not normative legal theory but sociology or social psychology”¹⁵⁸. It becomes, that is, a “study of society at large”; but precisely because it aims at uncovering a *concept*, one that is significant beyond the contours of this or that particular society, further criteria are brought into play.

To begin with, Hart states that a society that ‘has’ law will display a particular set of features: namely, the coexistence of “primary rules” governing individual conduct, and “secondary rules” that determine the validity of those primary rules. Secondly, he distinguishes between two possible attitudes that may be taken towards rules: one may consider a rule from an ‘external’ perspective, whereby one describes the rule as an inflection of an observable regularity, stating simply that it exists; or one may adopt an ‘internal’ perspective, in which one adopts a ‘critical reflective attitude’ towards a given rule, accepting it as a genuine standard by which to regulate one’s own conduct. These two sets of seemingly simple distinctions form the basis of

¹⁵⁶ The distinction between the two objectives is blurred: Fitzpatrick explains that Hart can only provide such a ‘concept’ by taking a route via an exploration of the ‘essence’ of law.

¹⁵⁷ Cotterrell, *The Politics of Jurisprudence*, 91.

¹⁵⁸ Ibid.

the search for a concept that circumvents the Austinian reduction of law to commands and threats of sanction, and which postulates in turn the means whereby the exercise of political power can find the validity that transforms it into 'law'; but they are also distinctions which suffer, precisely in the service of representing validity, an unhappy coexistence.

First we encounter the special nature of the norm in the instance of primary rules: taking care to evade the sociological external observation of a rule as a regularity (and therefore to insist that such rules are more than mere 'habits'), these rules must be viewed as capable of eliciting some sort of commitment, some consequence in the life of the individual to which it applies; for "if... the observer really keeps austerely to this extreme external point of view and does not give any account of the manner in which members of the group who accept the rules view their own regular behaviour, his description of their life cannot be in terms of rules at all, and so not in the terms of the rule-dependent notions of obligation or duty"¹⁵⁹, thus disappointing the criterion of a command endowed with validity. Such validity, however, is to be discerned not by the force of society-wide internal attitudes towards primary rules, but by the incidence of secondary rules which concern not individuals but the officials whose task it is to use and exercise these secondary rules – of change, adjudication and recognition: the latter of which will, in the final ('ultimate') instance provide the highest rule that validates not only the entirety of the primary rules, but all other secondary rules as a matter of logic. Having first explained that primary rules must be something more than mere regularities, Hart goes on to state that the official does not 'merely obey [secondary rules] for his part only'¹⁶⁰: the latter adopts, by necessity, the internal attitude, understanding secondary rules as a genuine source or guide for his conduct. This is the only moment in the edifice of the legal system in which the internal perspective is necessary: at this juncture, Hart claims that individual citizens need only 'habitually obey' primary rules¹⁶¹. In this way, we encounter the first aspect of the general problem that permeates Hart's positivism. In Peter Fitzpatrick's understanding, "Hart effects the triumph of official determinations by making the internal aspect necessary only for them,"¹⁶² which in turn entails "an astonishing compression of contradictions":

"After having based both his criticism of previous ideas of law and the lineaments of his alternative on the necessity for rules to have an internal aspect, Hart proceeds to deny that necessity. Although previously he wrote that the internal aspect cannot be envisaged in terms of individual mental states, he

¹⁵⁹ Hart, H.L.A. *The Concept of Law*, (2nd Edition) (1997) (Oxford, Oxford University Press), 89.

¹⁶⁰ Ibid., 116.

¹⁶¹ Ibid., 114.

¹⁶² Fitzpatrick, P "Supplementing Jurisprudence"; in Fitzpatrick, P (ed) *Dangerous Supplements: Resistance and Renewal in Jurisprudence*, (1991) (Durham, N.C., Duke University Press) 18.

now treats of its presence and absence in terms of individual mental states. And despite having thus subordinated the internal aspect to individual mentality, Hart posits the possibility of a society in which that mentality eliminates the internal aspect for ‘the ordinary citizen’. This is a strange society. It is a society without social relations...”¹⁶³

Let us say at this juncture that the problem that faces Hart’s *Concept* is twofold, and that it gives cause for demur on the same terms as did Kelsen’s Pure Theory. In the first instance, Hart wishes to evade the reduction of law to commands of the sovereign: he may only do so by bringing to knowledge the system of rules by which this power can be represented as ‘law’ (since we cannot rely upon the uniform instance of the consciously executed internal perspective of individuals; and to suggest that they follow rules ‘habitually’ without coupling habit with *intention* – albeit one that is not critically reflective – is nothing more than an observation in the idiom of sociology, and we must find a way to contain the ‘drift’, namely by coupling these rules with ‘validity’). The “unthought” representation of commands as norms has its grounding in a system of primary and secondary rules. But any such system of rules entails for its cogency a sustained engagement with certain genuine acts of consciousness, to instances of critical reflective thought, on the part of certain individuals. Secondly, these individuals are in turn endowed with ‘official’ capacity, making it difficult to extract their internal perspective, together with their belonging to an extraordinary interpretive ‘group’, from the ‘will of the sovereign’. And so, in order to distinguish law from the brute exercise of sovereign power, the actions of officials must also be governed by rules; a requirement that meets its critical moment in the ultimate rule of recognition grounds the entirety of the system.

The ultimate rule of recognition is the secondary rule that grounds the entire system of law in the last instance; and while its existence must be ascertainable beyond doubt, for the purposes of those officials who believe it, in order for the system to exist, determining its content is no less a question of distinguishing the ‘core’ of meaning of what the ultimate rule of recognition *is* from the penumbra of possible interpretations of the same. “Having thus elevated authority beyond constraint,” explains Fitzpatrick, “Hart now vainly seeks to subject it to the essential meaning of rules, meanings as to which there can be ‘no doubts’ in ‘the vast, central areas of the law’”¹⁶⁴. And yet, by Hart’s own admission, Fitzpatrick continues, even at times such as these (he leads the example of the possibility of doubt even concerning what it means to be ‘enacted by Parliament’) core and penumbra are indistinguishable¹⁶⁵; or “rather, they can only be

¹⁶³ Fitzpatrick, “Supplementing Jurisprudence,” 18.

¹⁶⁴ Ibid., 22.

¹⁶⁵ Ibid., 25.

distinguished by the mysterious invocation of a way ‘which lawyers would recognise’, by resort to ‘whatever is specific or peculiar in legal reasoning’¹⁶⁶. Something akin to intersubjectivity, or a shared belief, germane only to lawyers, is at work here: “[t]his,” he concludes, “is simply ‘the language of legal faith’... It is also the language of ultimately unquestionable legal authority.”¹⁶⁷ Thus one is invited to discern the unquestioning attitude towards authority in the last instance, the position adopted by lawyers to the exercise of arbitrary power, as a matter of *legal faith*: the delicate work undertaken by Hart to show the representation of the “system” in the minds of officials easily renders the whole thesis vulnerable to what Foucault would call the ‘counter-scientific’ destruction of a human science, in pre-emptory fashion: before it even has a chance to *live* as a human science. Before, that is, it is able to make the case for the ‘representation’ of the norm in the unthought: the arbitrary nature of political power prevents the thesis from following a path that brings to knowledge a ‘system’ of rules that correspond to the need to representing, in a theory, the unthought representation of commands backed by power as valid ‘norms’ on the level of experience, limiting such representations to the sphere of officials and exposing *a priori* the absurdity of the entire arrangement.

Whether Legal Positivism is a Human Science

If legal positivism behaves like a human science, it does so *problematically*: unlike usual human sciences dealing with life, labour and language, the determination of Man by a political power over which he must be shown to have some sort of representative control is not what we might call a ‘positive’ or ‘creative’ aspect of his life as is the case in thinking, exchanging, or in cultural production. Rather, the creation of the law-object or law-problem appears to emerge on the basis of an ideological *need* to demonstrate the adequacy of power and right, to imagine the ‘representation’ of the exercise of power in the life of a community, and finally to provide a theory of that representation capable of showing (by inventing) the structure of its existence. It is simply by virtue of the fact that this representation putatively ‘occurs’ that the legitimacy of power is guaranteed: by virtue of being a ‘representation’ of the power that limits us in the space of the ‘unthought’, this power loses its arbitrary sting, taking on a renewed significance – just as the life of the mind that determines the life of the body takes on renewed significance as the ‘psyche’ in psychology; or as the multiplicity of other individuals takes on renewed significance of ‘social structures’ in sociology.

¹⁶⁶ Fitzpatrick is citing *Concept of Law*

¹⁶⁷ Fitzpatrick, “Supplementing Jurisprudence,” 25.

But if we understand in legal positivism something like an attempt to ground the law in the ‘unthought’ – to establish, that is, a ‘representation’ to ourselves of political power or coercion in a manner that changes its nature from ‘power’ to ‘law’ – it becomes clear that the project is frustrated at the outset by the arbitrary nature of the law, by its indelible association with authority. If we recast the system of rules as the ‘organising principle’ that allows us to bring to knowledge the way in which ‘law’ exists as an unthought ‘representation’ of the power that limits us, it is nonetheless impossible to generalise this organising principle, to make of it an anthropological necessity. The existence of law cannot depend – or at least, not wholly¹⁶⁸ – upon the attitude of individuals towards the rules that determine them. The non-necessity of the internal point of view of individuals in determining secondary rules, for example, is the very part of Hart’s *Concept* that prompts Fitzpatrick’s allusion to the ‘apotheosis of the official’; and so there is no question of the necessity of ‘belief’ in the sense of ‘commitment’, notwithstanding the ideological or unconscious nature of the latter, as to the adequacy of power and right, even in legal positivism. Indeed, if it were the case that this ‘representation’ of law occurred in the unconscious proper, then it would be difficult to speak of law at all: the object would instead be one of everyday meaning and practice, as opposed to arbitrary, serious meaning characterised by its ability precisely to direct the conduct of an individual contrary to what he otherwise wills to do. The severity of the law cannot be lost in the pursuit of its representation.

Hart, as Fitzpatrick explains, resolves this issue by limiting the moment of the ‘internal perspective’ (and thus, in human-scientific nomenclature, of representation) to the ‘apotheosis’ of the system, to the hypothetical foundations of the structure, its origins. It thus enjoys a singular occurrence in the life of the system; and everything stemming therefrom is derivative of this occurrence. In Kelsen the specificity of the norm as the meaning of an ‘act of will’ is necessary to distinguish it from ordinary meaning; but the ingress of propositional logic into the system of law can only be prevented by engaging power-conferring norms in an iterative process that begs the question of its ‘origins’, invoking the problems of mythologeme and future anterior, undermining its truth and giving it over to violence. In one moment, we encounter the reduction of the system to its origins, leaving it vulnerable to destruction by the counter-sciences. In the other, the origin of the system is nowhere to be found, its absence constantly deferred and denied.

And so we encounter an aporia in the question over the relationship of law and the human sciences, at least insofar as we follow Foucault’s understanding of the latter: if we are able to

¹⁶⁸ Hart does claim that primary rules are one part of the system, but that they must be accompanied by secondary rules; in this he appears to be replicating Austin’s criterion of the “habit of obedience” to the sovereign, albeit that he deems Austin’s reduction insufficient; cf Cotterrell, R. *The Politics of Jurisprudence*, supra n. 137, at 95.

encounter something like ‘law’ at all, it must be in the context of a type of ‘representation’ that sutures the void between political power and legitimacy left in the wake of the Classical age and the political thought that coincided with the same. But the means by which we bring that putative ‘representation’ to knowledge must always be frustrated by the association of the law-object with the “will” to which it must resist every reduction. It is not possible to extend this instance of ‘representation’ to the entire reach of the system without suggesting that the law derives from the inherent attitude of individuals towards political power – for then it would cease to have its arbitrary significance. Legal positivism of the analytic type¹⁶⁹ is a response to a need for ‘law’ that emerges only with the decline of representation; a need that it cannot, in the last instance, fulfil.

Perhaps it is possible to draw certain insights in the furtherance of the attempt to conceptualise something like a ‘law object’ from the manner in which legal positivism *behaves*, in so many ways, like a human science; from the frustration of its ends and its awkward positioning as a *failed* human science? Might we not say that it is the fear of power, the fear of reductivism, the *commitment* to the Rule of Law in each case – these liberal concerns that inform legal positivism – that engender the project of bringing that power *into line* with right, with authority; attempting to state the conditions under which the former is adequate to the latter? Perhaps these fears and commitments incur, by the force of their efforts of *avoidance*, the vulnerability and frustration of each theory in the ways outlined above: for they demand the formulation of a timeless or universal scheme that could guarantee that adequacy once and for all; they insist that the law is secured from power without reversion. This would explain why the ‘system of rules’ is presented each time as something intractable, permanent, a truth inhering in the life of a society: the system is more than a mere presupposition or idea for the purposes of a legal science, it is a modality of thinking that pertains to a whole group of actors and that can be brought to knowledge with the same consistency as any other system whereby Man structures the unthought representations of the life that surrounds and delimits him.

It is precisely this anxiety that frustrates the task of accounting for a ‘law object’: the epistemological ends are defeated in the last instance by the commitment of each theory to a political ideology, to the need to render permanent and irrefutable the system of validity that pretends to guarantee the irreducibility of law to executive power. Is it possible to pursue the epistemological question over ‘law’ without capitulating to this anxiety? Is there any critical value in asking the question of the ‘law object’ under the auspices of understanding the ‘legitimation’ of political power in a way that does not wish to disguise or compensate for the latter? Might the

¹⁶⁹ I omit systems theory which is a ‘positivism’ of a sociological kind and which therefore enjoys a more complex relationship with the human sciences. I shall deal with systems in a restricted sense in the final section.

resulting method avoid the conceptual and epistemological frustrations encountered in analytical forms of legal positivism? What form might this method take? If the vulnerability of extant ‘human scientific’ theses emerged out of an anxiety over power, and if these vulnerable areas are traceable each time to the problem of origins, might we conceive of a form of legal ‘epistemology’ that neither hypostatizes at the apex of a system of rules, nor generates a void or a cleavage that must be constantly concealed? Finally, if we are to apprehend the conditions of ‘legitimacy’ while dispensing with the need to accord these conditions anthropological significance, how else might we account for their force, in the knowledge that arbitrary power finds a way to function insidiously, with some semblance of legitimacy, and without continuous recourse to violence? Of the dichotomies that emerge in the above discussions of positivist jurisprudence – between myth and sociology in Hart, and between logic and ontology in Kelsen – it is the ‘ontology of norms’ that stands out as curiously uncharted territory. We may recall that such an approach would entail a concern not over the conditions of validity of norms, but over their conditions of *existence*: a feature that so happens to coincide with the archaeological response to the epistemic ‘event’ of the human sciences.

The Archaeological Method

On the face of it, Foucault’s *Archaeology of Knowledge* seems to have very little to do with law. Written in the wake of the *Order of Things*, the text that develops the ‘archaeological’ insights of the latter into a methodology in its own right advances from a position peculiar to the history of the sciences. While in the previous work, Foucault had asked how similarities were ordered together in broad historical formations (*epistemes*), the archaeological method reaches more deeply into the analysis of particular groupings of discursive unities – corresponding roughly, but crucially not commensurably, to what we might understand as ‘discourses’, ‘sciences’ or ‘ideas’. The main point of the archaeological method is to disrupt the historical criteria whereby the changes, shifts and discontinuities from one discursive unity to the next is organised by existing historical methods: these are tainted, argues Foucault, by their anthropocentrism: since the age of Man is drawing to a close, it is imperative to dismantle this ‘last bastion’, history, which hitherto had provided a “shelter” for the subject in its sovereignty, and which lay dependent upon the ‘consciousness’ which characterises the modality of Man.

Preliminary Matters: “Against” Historicism

The centrality of history as the ‘mother of the sciences of man’¹⁷⁰ is stated in the *Order of Things*: history enjoys a strained relationship with these human sciences, since it limits the scope of their investigations to a particular historical context, but is also subject to limitations of its own, insofar as Man is the source of his own historical knowledge. If the Classical era constructed a great chronological history of things, the ‘vast historical stream, uniform in each of its points, drawing with it in one and the same current, in one and the same fall or ascension, or cycle, all men, and with them things and animals, every living or inert being, even the most unmoved aspects of the earth...’¹⁷¹ – this was ‘shattered at the beginning of the nineteenth century’; which saw the proliferation of separate histories, each with their proper subject matter: natural history, language, economics – each with its ‘own particular coherence’¹⁷². As a result, ‘the human being no longer has a history’: putatively subjected to determination by these different types of history, no longer having a history of his own, a time of his own – a situation which would offend against the hubris of Man, his centrality as the organising principle of knowledge. Foucault explains:

“...man found himself dispossessed of what constituted the most manifest contents of his history: nature no longer speaks to him of the creation or the end of the world, of his dependency or his approaching judgement; it no longer speaks of anything but a natural time; its wealth no longer indicates to him the antiquity or the imminent return of a Golden Age... language no longer bears the marks of a time before Babel or of the first cries that ran through the jungle...The human being no longer has any history: or rather, since he speaks, works, and lives, he finds himself interwoven in his own being with histories that are neither subordinate to him nor homogeneous with him”¹⁷³.

Where these types of history, concerning the ‘sciences’, persist alone, Man finds himself ‘dehistoricised’. And so there emerges the need for an historicity that places Man back at the centre not just of knowledge, but of his own history. There emerges a ‘history of Man’, “which is itself its own history but also the radical dispersion that provides a foundation for all other histories”¹⁷⁴. This engenders, explains Foucault, an unsupportable fluctuation: Man is the source of the principles that organise history; but he is also subjected to history, he is determined by

¹⁷⁰ Foucault, M *The Order of Things*, 400.

¹⁷¹ Ibid., 401.

¹⁷² Ibid.

¹⁷³ Ibid., 402.

¹⁷⁴ Ibid., 403.

historical events, his own history changes through time. There is thus a constant grappling in historicism between the conscious articulation of the history of events and the articulation of criteria according to which they are organised: the very source of this 'history' is also *subject* to history, to the ebb and flow of events in time, which are always out of step with consciousness. This would give us reason enough not to trust a history, especially the history of ourselves, the history of those events and discourses that we understand as constituting the modalities of our lives and discourses – insofar as it has its source in the subject, in Man.

Now, for our purposes, it is important first to denote that this renewed, subject-centric version of history occasions in the human sciences a lack of universality: since Man is the source of its objects, these objects coincide with the history of Man, are valid and relevant only for the duration of a particular phase of his history, a culture or a lifespan. Thus the objects that the human sciences reveal – a system of significations, or a set of social rules – cannot be understood as having any necessary truth. Furthermore, this subject-centred history is itself also subject to that same limitation. As the source of historicism, Man is subject to history, too: therefore, whatever criteria emerges from a history that is the 'synthetic activity of the subject', the "last bastion of philosophical anthropology": this also survives, *mutatis mutandis*, for a particular duration of Man's own history, within the boundaries of a specific cultural context.

Thus, if Foucault's concern is to conduct a history of knowledge that is adequate to containing under its own epistemological aegis the human sciences, it must also be strong enough to contain the very subject-centred forms of 'history' that determine the latter. In the end, modalities of 'history' *too* would be subject to critique. Foucault's first point of attack is on the criteria that are ordinarily used to conduct histories: traditions, influences, development, teleology, evolution, spirit of an age. "It is necessary to abandon those readymade syntheses," he explains: "those groupings which are admitted before any examination, those links of which the validity is accepted at the outset"¹⁷⁵. It is also necessary to disrupt accepted criteria whereby discourses are distinguished, the forms and genres to which they are said to belong: these distinctions are far from self-evident, for Foucault; rather, they are "reflexive categories", "facts of discourse which merit analysis alongside other facts"¹⁷⁶. Having set himself the task of doing away with all these accepted distinctions, self-evident criteria and categories, Foucault undertakes to start afresh: seeking out a mode of doing history that is not grounded in the subject, and is capable of analysing how discursive events, ideas, forms of knowledge, could be grouped together into specific unities at different times, understanding the changes between them, the

¹⁷⁵ Foucault, M "On the Archaeology of the Sciences: Response to the Epistemology Circle"; in Foucault, M *Aesthetics, Method, and Epistemology*, supra n. 116, 302.

¹⁷⁶ Ibid., 303.

shifts they undergo, without relying on the ‘truth’ of ‘readymade’ categories or distinctions. He understands the project he advances as the undertaking of a “general” history, rather than a “total” history in which “all the differences of a society might be reduced to a single form, to the organisation of a world-view”¹⁷⁷, or that would use a single set of historical criteria to account for differences and continuities in the history of phenomena, and which would thus suppose “that history itself may be articulated into great units... which contain within themselves their own principle of cohesion”¹⁷⁸. The task to which history is directed is no longer to ascertaining the truth or validity of the phenomena, putative ‘documents’, the traces and inscriptions left to time; but towards organising these phenomena, regardless of their meaning; transforming ‘documents’ which speak into mute ‘monuments’ that can be arranged according to a particular series of criteria. Against this, Foucault’s “general” history will deploy a “space of dispersion” which does not strive to give a singular understanding or interpretation to historical phenomena (which, taken in this light, Foucault refers to as ‘documents’); but which will rather consider these series of groupings and interpretations and account instead for the nature, rarity, transformation of the *relationships between them*.

The Statement

Unable to deploy the traditional criteria under which historical phenomena are to be grouped together, Foucault now undertakes “the project of a *pure description of the facts of discourse*”¹⁷⁹. In order to do this, Foucault introduces, as the preliminary material with which his analysis is conducted, the concept, or function, of the ‘statement’. We may understand the ‘statement’ as the ‘atom’ or ‘elementary unit’ of discourse; but it does not belong to such discourse in the same way that a linguistic or logical unit might belong to its whole. “When one wishes to individualise statements,” he explains, “one cannot therefore accept unreservedly any of the models borrowed from grammar, logic or ‘analysis’”¹⁸⁰. He distinguishes it from the ‘proposition’, since two different statements may be indistinguishable from a logical point of view. Neither is it a ‘sentence’, for there need not be a particular linguistic structure to a statement¹⁸¹ (the letters of a keyboard, AZERT, are cited as an example of a statement – for it indicates something, the order in which typing occurs on each keyboard). It is also distinguished from the ‘speech act’ *as such*

¹⁷⁷ Foucault, *Archaeology of Knowledge*, 14.

¹⁷⁸ Ibid., 10–11.

¹⁷⁹ Foucault, “On the Archaeology of the Sciences: Response to the Epistemology Circle,” 306.

¹⁸⁰ Foucault, *Archaeology of Knowledge*, 94.

¹⁸¹ Ibid., 92.

(although it is very close to this concept): a speech act often requires *more* than a statement to be made – a promise, for example; and other speech acts involve a multiplicity of statements. Preliminarily speaking, statements can be described as instances of signification that are acceptable or serious for the time to which they belong. They are procured by the archaeological method quasi-empirically, by the observation of what *was* said seriously at a particular point in time. But its existence as a ‘statement’ cannot depend solely upon its material observation: it is not quite an empirical phenomenon, but an abstraction of certain forms of speaking and signing. In this abstraction, the statement comes into existence, archaeologically and for the first time, endowed with a “quasi-incorporeal materiality”¹⁸²: it is not the utterance taken in its meaning (divorced from the “sweet interiority of consciousness”¹⁸³); neither is it “outside” of meaning – archaeology is no longer interested in silence.

The statement is not, however, simply the “extrinsic material” of language: it is not the simple substance of the ‘sign’, insofar as “any series of signs...whatever their organisation or probability may be – is enough to constitute a statement”¹⁸⁴: on the contrary, it exists on a different level from language¹⁸⁵; it cannot be understood by reference to the sheer ‘materiality’ of the sign. Rather, “it is a function of existence that properly belongs to signs and on the basis of which one may then decide, through analysis or intuition, whether or not they ‘make sense’, according to what rule they follow one another or are juxtaposed, of what they are the sign, and what sort of act is carried out by their formulation”¹⁸⁶. To something more than a mere sign, then, and distinguishable from the ‘speech act’, Dreyfus and Rabinow add their own description of the statement as a ‘serious speech act’ which occupies an autonomous realm distinct from meaning and simple illocution:

“Such speech acts gain their autonomy by passing some sort of institutional test...Any speech act can be serious if one sets up the necessary validation procedures, community of experts, and so on...”¹⁸⁷

We might, without too much in the way of reduction, say that statements are instances of what could be said or done in a way that is socially *significant* in a particular time and place. It is the fact

¹⁸² The expression is used by Daniel Defert in the appendix to Foucault’s Lectures at the College de France 1970-1971; see Defert, D “Course Context” in Foucault, *Lectures on the Will to Know: Lectures at the College de France 1970-1971 and Oedipal Knowledge*, trans. G. Burchell, Defert, D (ed) (2013) (Palgrave Macmillan), 266.

¹⁸³ Foucault, M “Maurice Blanchot: The Thought from Outside” in Foucault, M and Blanchot, M *Foucault/Blanchot*, trans. B. Massumi and J. Mehlman (1990) (New York, Zone Books) at 33 (“Where is the law, and what does it do?”): “If it were self-evident and in the heart, the law would no longer be the law, but the sweet interiority of consciousness”.

¹⁸⁴ Foucault, *Archaeology of Knowledge*, 95.

¹⁸⁵ Ibid., 96.

¹⁸⁶ Ibid., 97.

¹⁸⁷ Ibid., 48.

of their significance, rather than what is being signified, that is of concern to the archaeologist. It is not necessary, therefore, to occupy the position of that time and place in order to discern what counts as a statement: as Dreyfus and Rabinow explain, Foucault ‘doubly brackets’ the meaning and truth of statements, and so the analysis of statements is removed from the way in which their content is experienced for those speaking or hearing them. Foucault explains that the observation of the statement, rather than of an utterance, a sentence or a signifying ‘sign’, operates on a separate level of analysis; it involves a change in perspective. In other words, it is only by means of a particular attitude, taken by virtue of the archaeological method, that so many signs, utterances, visibilities – may be presented as ‘statements’¹⁸⁸. The analysis of statements will therefore reveal something entirely different from the methods of interpretation: it will not question signs for their *significance*: rather, it will consider them in their ‘modality of existence’¹⁸⁹; it will question not *what was meant*, but rather *what could be said*. How might we identify statements in their rarity, however, if we have bracketed the truth and meaning of the latter? Since we are not concerned with the meaning of signs but the existence of statements, there is no scheme of significance, no language or logic, according to which we may determine in advance whether a group of signs is a ‘statement’¹⁹⁰.

“We will call *statement* the modality of existence proper to a group of signs: a modality that allows it to be something more than a series of traces, something more than a succession of marks on a substance, something more than a mere object made by a human being; a modality that allows it to be in relation with a domain of objects, to prescribe a definite position to any possible subject, to be situated among other verbal performances, and endowed with a repeatable materiality”¹⁹¹

Albeit that statements are ‘serious’ as Dreyfus and Rabinow suggest, they are not being analysed for their ‘seriousness’, but rather for their rarity. We might say then, that, given that there *are* serious statements in a given society or culture, how do we determine their rarity, their modalities, their conditions of existence? What appears as “serious meaning” in the dimension of the social takes on a different significance for the purpose of archaeology. The latter discerns the conditions under which statements ‘exist’: not what they ‘mean’, but “what it means for them to have appeared when and where they did – they and no others”¹⁹²; and in this sense one is

¹⁸⁸ Ibid., 122.

¹⁸⁹ Ibid., 120.

¹⁹⁰ Gary Gutting, while making this point, adds that statements are not dissociated from the semantic sphere, and the existence of statements is relevant to whether a group of signs is true or meaningful. cf Gutting, G. *Michel Foucault's Archaeology of Scientific Reason*, (1989) (Cambridge, Cambridge University Press), 240.

¹⁹¹ Foucault, *Archaeology of Knowledge*, 120.

¹⁹² Ibid., 123.

concerned only with the ‘fact of language’. Statements are observed simply in their facticity, in their occurrence; their very existence being indicative of something wider – the unity of the discourse to which they belong.

Rules of formation and Discursive Unities

The answer is that individual statements can only be discerned by virtue of their position in an ‘associated field’ comprised of other statements¹⁹³. In the first instance, then, signs taken in their sheer facticity are to be placed beside each other in order to discern connections, regularities, rules and groupings between them. If the statement is the ‘atom’ of discourse, its smallest ‘element’, we may understand the relationship between statement and discourse, as a point from which to start, as that between the whole and the part: as Foucault explains, “a statement belongs to a discursive formation as a sentence belongs to a text”¹⁹⁴. But there are two things to bear in mind. First, the scheme of belonging is not a case of inference from a higher principle or a mere fact of emplacement: rather, the whole and the part are mutually constitutive. Secondly, and notwithstanding this arrangement, these ‘atomic’ parts are not related constitutively to the whole as signs are related to structures of signification – as we shall discover.

In the first instance, however, if statements cannot be discerned independently of their belonging to an associated field of other statements, and given that the purpose of the archaeology was to dispel traditional methods of grouping and categorisation, how are we to devise a discursive unity from the observation of statements? Should we group them together insofar as they have things in common? Foucault deliberates on this point: several serious statements might concern the same objects or concepts; they might share a manner of speaking or they may emerge only as ‘statements’ when uttered by a particular set of people who are authorised to speak, or in a certain time and place (‘enunciative modalities’); they may be directed towards the same theory or share the same themes or ideas (strategies). However, such methods of grouping statements must fail, or at least they must fail *on their own*: discrete ‘unities’ of discourse, collections of statements that can be said to belong ‘together’, are characterised by the admixture of these four elements. Foucault takes the examples of medicine, economics and grammar to query the basis on which they might achieve their unity:

¹⁹³ Ibid., 110.

¹⁹⁴ Ibid., 130.

“On a full, tightly packed, continuous, geographically well-defined field of objects? What appeared to me were rather series full of gaps, intertwined with one another, interplays of differences, distances, substitutions, transformations. On a definite, normative type of statement? I found formulations of levels that were much too different and functions that were much too heterogeneous to be linked together and arranged in a single figure... On a well-defined alphabet of notions? One is confronted with concepts that differ in structure and in the rules governing their use, which ignore or exclude one another, and which cannot enter the unity of a logical architecture. On the permanence of a thematic? What one finds are rather various strategic possibilities that permit the activation of incompatible themes...”¹⁹⁵

In fact, it is the very relationships that emerge between these elements – their ‘system of dispersion’, that accounts for the unity of a discourse. Rather than asking discursive formations to reveal their unity by virtue of similarities or differences in their concepts or objects or theories, instead of trying to ‘isolate small islands of coherence in order to describe their internal structure’¹⁹⁶, the archaeologist describes ‘systems of dispersion’ of statements:

“Wherever one can describe, between a number of statements, such a system of dispersion, whenever, between objects, types of statement, concepts or thematic choices, one can define a regularity (an order, correlations, positions and functionings, transformations), we will say...that we are dealing with a *discursive formation*...”¹⁹⁷

Any discursive formation is defined, then, in part by reference to the rules that can be discerned for the formation of statements, the rules concerning which concepts, objects, themes and strategies are recognised as ‘valid’ at a particular place and time; rules which discern whether utterances have serious meaning. But in the absence of formal guiding criteria, reference to these rules alone cannot allow us to determine the discreteness of a discourse without first presupposing the latter (a category error against which we have already been warned): we can only get at the discrete unity of a particular discursive formation – we may only distinguish one from the next – by looking at how these rules relate *to each other*. These elements governing the production of statements are never connected to each other in the same way from one discursive formation to the next: the system of relations that occur between them is unique to a particular discursive formation. The rules concerning elements intersect and relate to each other in various different ways so that no two systems of dispersion are the same.

¹⁹⁵ Ibid., 41.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid.

And here is where the difficulty, and the significance, of the archaeological method comes to the fore: if statements are conditioned by the rules of formation of a discursive unity, these rules of formation operate only insofar as that discursive unity persists: insofar, that is, as the regularities between these rules of formation hold together in a particular way. Such is the distinction made by Dreyfus and Rabinow between the ‘primary’ and ‘secondary’ rules of discourse: “The rules that the archaeologist discovers...are second-order rules of rarity that determine which first-order rules, concerning what subjects, objects, concepts, and strategies can be taken seriously, are followed at a given time”¹⁹⁸. However, insofar as we have already said of the statement that “[t]he fact of its belonging to a discursive formation and the laws that govern it is one and the same thing”¹⁹⁹ then archaeologically speaking, the second-order regularities that account for the rarity of a discursive formation are set in epistemological *priority* over the statement. And yet, it is only by reference to the statement, which constitutes the primary ‘material’ of the investigation, that we may come to discern the rules they obey, the relationships between these rules, and thus the rarity of discursive unities themselves.

For Dreyfus and Rabinow, this is what causes archaeology to steer very close to structuralism, despite Foucault’s objections that he is not a structuralist: for the whole and its parts appear mutually determinative. If this is true, then the sense in which we may speak of ‘rules’ of formation of statements will become conditional upon the same epistemological criteria as structuralism. Of particular note for Dreyfus and Rabinow is the category of the ‘unthought’ invoked by structuralism; a category which gives rise to problems for the archaeology insofar as it attempts to reconcile the unity of discourse with serious speech acts, just as it has been shown above to engender difficulties wherever it is a latent condition in the effort of legal positivism to reconcile the law-object with its arbitrary nature. Foucault claims, however, that “this is not paradoxical since the discursive formation is characterised not by principles of construction but by a dispersion of fact, since for statements it is not a condition of possibility but a law of coexistence, and since statements are not interchangeable elements but groups characterised by their modality of existence”²⁰⁰. What, then, is the significance of this distinction between ‘principles of construction’ and ‘dispersion of fact’? How should we understand the relationship between these second-order rules of rarity and the statement? Is it, as Dreyfus and Rabinow will argue, a contradictory and unworkable formulation? If there are rules for the formation of statements, in what manner are they prescriptive, rather than mere regularities between factually recorded objects?

¹⁹⁸ Dreyfus, H and Rabinow, P *Michel Foucault: Beyond Structuralism and Hermeneutics*, supra n. 123, 93.

¹⁹⁹ Foucault, *Archaeology of Knowledge*, 131.

²⁰⁰ Ibid.

Foucault's Historical *a priori*

Archaeology constructs a complex system comprised, on one hand, of discursive unities characterised by the relationships between rules of formation – constellations which have a unique identity, which cannot occur more than once, and which guarantee the discreteness of a discourse. On the other hand, we have rejected the use of prior categories with which we might ordinarily determine a discursive unity, we have rejected all hitherto forms of historicism that might allow us to discern their duration, their rise and fall; and so our investigation must proceed by reference to statements in the first instance. And yet these are serious utterances and signs *only by virtue* of the rules of formation that allow them to operate as such. We can only know about a discursive unity by considering what has been said seriously at a given time and place; from here inferring the first order rules that determine this seriousness; and only as a tertiary matter can we then discern the regulations that comprise the unique discursive unit. Finally, it is by virtue of this discursive unity *alone* that an utterance has its added significance, its status as a 'statement'. If this is not a paradoxical situation, it is at the very least a problematic one.

Dreyfus and Rabinow explain that the rules of formation are not the rules actually followed by practitioners; but are instead "second-order rules of rarity that determine which first-order rules, concerning what subjects, objects, concepts, and strategies can be taken seriously, are followed at a given time."²⁰¹ Since these are nothing to do with the practitioner, the archaeologist does not, they explain, reveal something in the 'unconscious' in the form of unawakened beliefs (just as in legal positivism we cannot conceive of a system of rules in the unconscious lest we cease to talk about 'law' in all its arbitrariness). Indeed, Foucault insists that he is analysing discourse "without referring to the consciousness, obscure or explicit, of speaking subjects; without referring the facts of discourse to the will – perhaps involuntary – of their authors; without having recourse to that intention of saying which always goes beyond what is actually said..."²⁰² Nevertheless, they insist, and given the investigatory (as opposed to the epistemological) priority of the 'statement', the archaeologist's task is "*motivated* by the speakers' conviction that they are uttering serious truths about man and society"²⁰³ and so this conviction is at least, in their understanding, "recuperated" by the archaeological method. Because the transformation of an utterance into seriousness, a seriousness experienced by living and speaking

²⁰¹ Dreyfus and Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics*, 93.

²⁰² Foucault, "Politics and the Study of Discourse"; in Gordon, C, Miller, P and Burchell, G (eds) *The Foucault Effect: Studies in Governmentality*, (1991) (Chicago, University of Chicago Press) 59.

²⁰³ Dreyfus and Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics*, 94 emphasis mine.

beings, has as its condition the prior existence of a set of ‘second-order rules’ which cannot be discerned save by virtue of the archaeological method, what distinction, if any, are we to discern between this method and the bringing to knowledge of an unspoken system of rules by virtue of which certain forceful utterances are represented as being ‘serious’, just like the ‘systems of validity,’ according to which some utterances are legal norms, are brought to knowledge in positivism? And if this is true, would it not run into the same difficulties as that positivism, owing to the difficult relationship between the rules that one follows and the system that distributes these? It is worth quoting Dreyfus and Rabinow’s position in the detail in which it is given:

“It seems that the *Archaeology* has simply transferred the problem of self-grounding from representation to objectification. Indeed, archaeology as an analysis of rules and norms not available to those who are determined by them, seems, according to Foucault’s definition, to be radicalised human science. In the human sciences the *unconscious* system of significations must be recuperated by consciousness.... In archaeology this recuperation of the unthought by thought becomes the recuperation of a *nonconscious* system of rules as an explicit theory. Thus, it is no longer the forms and contents of consciousness, but the forms and contents of serious discourse, whose conditions are being sought. But the structure is the same: “signifying totalities” have simply been replaced by “systems of dispersion,” and transcendental rules have been replaced by transformation rules.”²⁰⁴

If Dreyfus and Rabinow are correct, if the archaeology is another instance of human science, albeit a ‘radicalised’ human science, then Foucault is unable to accomplish the main objective of freeing history from its anthropological grounding. He would be doing no more, in short, than bringing the ‘unthought’ to consciousness: he would be demonstrating that we have epistemological control over that which limits us; that we are able to represent – by virtue of following (non-consciously) a set of rules, a system of discourse – the delimitations that pertain to speaking seriously. In demonstrating this modality of representation, he would be placing the archaeologist at the centre of history, showing that the latter is capable, *by virtue of his archaeological practice*, to give those delimitations another existence, representing them as ‘statements’, bound to discursive rules over which he himself is master.

More crucially, however, whereas the human sciences bring to knowledge the systems in which ‘signification’ or ‘meaning’ can operate as representations in the unthought, archaeology as a human science would be doing nothing more than bringing the system of ‘serious meaning’ to knowledge; showing how ‘serious meaning’ can operate as a representation, we might assume,

²⁰⁴ Ibid.

also in the unthought. But this is a very uncomfortable transposition – it is one thing to say that ‘meaning’ can be systematised as so many ‘representations’; quite another to suggest that ‘serious meaning’, a meaning *beyond* meaning, can be represented in the ‘unthought’, or that it can belong to any such system of consciousness. Furthermore, because it is studying *serious* meaning, archaeology must be able to ground its own autonomy, to distance itself from other serious forms of discourse. It must insist that it is not affected by the unthought horizon that informs the very practitioners for whom statements have their serious meaning, for “[i]f everyone spoke from a position orthogonal to serious discourse, to speak orthogonally would make no sense”²⁰⁵. Once again, we encounter a method which both behaves much like a human science, and encounters an element of frustration because it is dealing, in the last instance, not with everyday meaning, but with seriousness – with arbitrary meanings, with a proliferation of secondary rules that try to do too much, that try to posit what Critical Theory²⁰⁶ might consider nothing more or less than *instrumental rationality* in such a way that we can give them universalisable conditions that save them from the reduction to power: in such a way, that is, that we draw them, by some epistemological hook, into *ourselves*.

A very serious claim: and one that has been instrumental in discrediting the archaeological method in general. But it is nevertheless only sustainable insofar as the level upon which secondary rules are articulated can be reliably transposed onto the level of unconscious representation that characterises the object of the human sciences. And this in turn hinges upon whether Dreyfus and Rabinow, and those who agree with their synopsis in one way or another, have correctly understood the character given to this level of rules in the *Archaeology*: for Foucault refers to any such connection of regularities, the substantiation of a discursive unity, with the ‘barbarous’ term “*historical a priori*”: a sort of Kantian-critical-theoretical²⁰⁷ portmanteau of “historical tradition” and “formal a priori” that produces, by Foucault’s own admission, “a rather startling effect”²⁰⁸. True to its barbarousness, this term, this reappearance of that grammatical

²⁰⁵ Ibid., 95.

²⁰⁶ On the relationship between the Frankfurt School and Foucault, see in particular Couzens Hoy and McCarthy, *Critical Theory*. Couzens Hoy and McCarthy, *Critical Theory* (1994) (Oxford, Blackwell) With specific reference to Foucault, Couzens Hoy claims that “poststructuralism is an alternative way of continuing the tradition of critical theory” (144), insofar as each is concerned with the question of the promise of the Enlightenment, the problem of its “dialectic” and the possibility of breaking free from the same. Specifically, Couzens Hoy acknowledges that “Whereas Foucault is interested in the historicity of reason, Habermas is interested in the theory of reason” (146): it is precisely this distinction that is often overlooked by critics of the archaeology.

²⁰⁷ Foucault’s relationship to Kantian enlightenment and the aims of critical theory are most succinctly expressed in this phrase. It is increasingly common when speaking of archaeology to denote Foucault’s indebtedness to Kant, whose ‘philosophical archaeology’ sought to hold against the history of reason all those ‘ruins’ of previous philosophies over against which this solitary history of progress could be projected (see also the Introduction to this thesis and Chapter 1 above).

²⁰⁸ Foucault, *Archaeology of Knowledge*, 143.

form that has been so closely associated with law and violence, law and power, law and history – is the wellspring of a series of strained interpretations.

The concept is introduced in the *Archaeology* as pertaining to the collection of regularities that make up a discursive formation, insofar as the latter is grasped by the archaeological method as a ‘positivity’: “this positivity (and the conditions of operation of the enunciative function) defines a field in which formal identities, thematic continuities, translations of concepts, and polemical interchanges may be deployed”, Foucault explains: “[t]hus positivity plays the role of what might be called a *historical a priori*”²⁰⁹. In the first instance, then, it is coterminous with the discursive formation, the unified mass made up of a constellation of regularities between rules of formation: we may understand it, like we understand the relationship of the statement to the serious utterance, as the fact of this discursive formation grasped at a particular level.

Emphatically, in the historical *a priori* transcendental conditions are substituted for ontological conditions:

“what I mean by the term is an *a priori* that is not a condition of validity for judgements, but a condition of reality for statements. It is not a question of rediscovering what might legitimize an assertion, but of freeing the conditions of emergence of statements, the law of their coexistence with others, the specific form of their mode of being, the principles according to which they survive, become transformed, and disappear.”²¹⁰

Not conditions of *validity* for statements, then: but their ‘conditions of reality’ – an ontological device according to which archaeology analyses the “laws of *existence* of statements”²¹¹. The move to ‘reality’, ‘existence’, the ontology of statements – distinguishes archaeology first from logic, just as the statement is distinguished from the proposition; but also from any theory involving the invocation of an authority which might legislate for the content of the serious speech act. Recall that the validity or legitimacy of serious statements is neither here nor there for the archaeologist who has bracketed in advance their truth and meaning. Statements belong to their own level of analysis: they correspond to a ‘fact of language’, they are “situated at a particular level that must be distinguished from the others, characterised in relation to them, and abstract”²¹². Foucault is interested not in what makes a speech act acceptable: he is not analysing “formal rules of construction: for [he is] not concerned about knowing what makes [discourse]

²⁰⁹ Ibid.

²¹⁰ Ibid.

²¹¹ Foucault, “Politics and the Study of Discourse,” op. cit. supra., n 202, 59.

²¹² Foucault, *Archaeology of Knowledge*, 121.

legitimate, or makes it intelligible, or allows it to serve in communication”²¹³. We must assume, then, that we are not concerned with the rules of ‘prescription’ for statements in the ordinary sense. And yet, notwithstanding that archaeology operates on the level of facts, it is also to be distinguished from an exercise in ‘description’. If the analysis of statements even on a level of abstraction is more than a simple description, then the element of ‘prescription’ that we might associate with validity and judgement becomes difficult to extract from a device such as the “historical *a priori*”, especially insofar as it revolves around the concept of ‘conditionality’: for surely a ‘condition’ is a normative device, even where it pertains to existence? And if it is such a normative device, then we must decide the question: for *whom* do these conditions prevail? For those to whose lived experience they pertain? Or for the scientist, the official, an authority that dwells at the apotheosis of a theory or practice, by whose ministrations alone such objects emerge? Just as Hart’s *Concept of Law* met with frustration in attempting to blur the line between sociological description and the prescriptive significance of rules, the historical *a priori* belongs to a category at the heart of the law in which the line between description and prescription becomes blurred, invisible or subject to a whole series of crossings. This, as I shall argue, is no coincidence: for the historical *a priori* expresses precisely the grammatical form of the law, engaging both past and future, both the description of things already in existence and the future-oriented modality of prescription.

But this position, of course, has never been put forward in any Foucaultian analysis: it is posed as an insurmountable problem, rather than an avenue for further inquiry. Insofar as the historical *a priori* ‘represents’ (for want of a better word) of a set of conditions of reality or existence, its characterisation is often conducted under some imagined duress, in which a choice must be made on the side of description or prescription respectively: in other words, that an election must be made concerning its function. Or rather, in the absence of any schematisation of the ‘paradoxical’ grammatical form of the future anterior, the constituent elements ‘historical’ and ‘*a priori*’ become detached, and one must decide how much weight to accord to each. Taking the latter of its component elements: it is an *a priori* not in the formal, Kantian sense; “[n]othing,” says Foucault, “would be more pleasant, or more inexact, than to conceive of this historical *a priori* as a formal *a priori* that is also endowed with a history: a great, unmoving, empty figure that irrupted one day on the surface of time, that exercised over men’s thought a tyranny that none could escape, and which then suddenly disappeared in a totally unexpected, totally unprecedented eclipse”²¹⁴. It is to be distinguished, first, from transcendental *a priori* conditions of knowledge, from a set of universally prescriptive conditions for the ‘truth’ or validity of

²¹³ Foucault, “Politics and the Study of Discourse,” 59.

²¹⁴ Foucault, *Archaeology of Knowledge*, 144.

statements. This much is generally acknowledged by those who consign archaeology to desuetude. On closer analysis, however, they find that this renewed understanding of the *a priori* sits uncomfortably with the fact that, freed from transcendental knowledge, it must now be inferred from the facticity of statements; and that this *ex post facto* scheme of inference frustrates what is perceived as Foucault's effort to construct a new form of epistemology, a science of sciences, a theory of knowledge. It must, these authors conclude, capitulate in the last instance to old forms of determination: either it is reducible to human science, and the link between statements and the system of rules of formation inferred from them can only be constructed by presenting the former as so many instances of 'representation' in the 'unthought' of acceptable speech, and which archaeology brings to knowledge by constructing the latter system of rules in an historically representational scheme of its own; or the historical *a priori* stands inadequately beside the transcendental conditions of knowledge that it was intended to displace. I will now examine two approaches to the historical *a priori* that make each of these conclusions respectively. Each favours the component of the '*a priori*' over the 'historical', giving the latter relatively little attention; this in turn can be attributed to their shared understanding that archaeology is above all an epistemological, which is to say, philosophical project. In contrast to these analyses stands an alternative categorisation of the archaeology as a type of history. In this reading, the epistemological stakes are far lower: at the centre of archaeology is not knowledge itself, not the different modalities of speaking the truth or being in the true, but the concern, in light of the fact that serious discourse *happens*²¹⁵, with its historical limits. Freed from the preoccupation with the *a priori*, the conditions of reality for statements become *historicised*: they are freed up for another, historical, form of determination.

In one of the most proficient philosophical studies of Foucault's *oeuvre*, Beatrice Han claims to identify a 'critical project' running through the entirety of the latter: Foucault was concerned, she suggests, in every moment of his work with the analysis of "the relations between the subject, truth and the constitution of experience"; and she articulates this theme as a deliberate inflection of the Kantian critiques, that is to say, the question over the possibility of true knowledge. Under the auspices of this "critical question" concerning the "conditions of the possibility of

²¹⁵ One is often tempted to follow Foucault's earlier description of the historical *a priori* (in *The Order of Things*), wherein it apparently coincides with the 'experience' or the 'there-is' of 'order'. This depiction was, as Beatrice Han explains, abandoned by Foucault in the *Archaeology*; she simultaneously argues, somewhat convincingly, that an anthropocentric betrayal inheres in ascribing such an ontology to 'order' (See Han, B *Foucault's Critical Project: Between the Transcendental and the Historical*, trans. E. Pile (2002) (Stanford, California; Stanford University Press) (55–60.) I therefore take up instead Dreyfus and Rabinow's allusion to 'seriousness', because this is more appropriate to the necessity of power and force, and therefore to the genealogical method that (as I shall argue in the next chapter) complements the archaeology.

knowledge,” Han charts a trajectory of the distinct versions of Foucault’s efforts to displace the transcendental or formal *a priori*: from the *episteme* in the *Order of Things* through to the “regime” of power-knowledge inhering in the genealogical ‘phase’, and finally towards the constitution of the self towards the end of his life. The archaeological version of this displacement in the form of the historical *a priori* therefore receives more consideration than is usual in most discussions of Foucault’s *oeuvre*, but it is one that is undertaken under the aegis of the “critical question”: therefore, notwithstanding Han’s attention to detail, the ‘conditions of reality’ for statements are poised to snap back into the ‘conditions of possibility of *knowledge*’ that Foucault is at pains to avoid. This is not an oversight on Han’s part: the non-formal nature of the *a priori* and the attempted evasion of transcendental conditions of possibility is stated clearly enough²¹⁶. Her strategy is twofold: first, it is to claim that the ‘conditions of reality of statements’ aim in the direction of the “critical question”; and secondly, it is to show that the historical *a priori* that substitutes for the transcendental theme is inadequate to that task²¹⁷.

Han accepts without question Dreyfus and Rabinow’s claim that the rules of formation are prescriptive, that they “operate on the phenomena”²¹⁸ of the statement; and adds to this an exegesis whereby the historical *a priori*, defined as “the conditions of reality for statements” is also equivalent to the given definition of a discursive practice, “a set of anonymous, historical rules that define... the conditions of operation of the enunciative function [the statement]”²¹⁹. She makes this connection, seemingly, by virtue of a tertiary definition of the historical *a priori* as “the set of rules that characterise a discursive formation”, and her exegesis culminates (also seemingly) in the indistinction between ‘conditions of reality for statements’ and ‘conditions of operation of the enunciative function’. From this rather complicated reading, she concludes that:

“either the definition is tautological, and takes a rather convoluted path only to end up by characterising...at least the conditions for the exercise of the enunciative function by themselves... or the definition is not tautological, but then generates a regression in the order of conditions of possibility, since one could only account for the conditions for the exercise of the enunciative function by means of [a] “set of rules” which itself would require another “set of rules” identical to the first, in which case archaeology would never have the possibility of ever encountering its object.”²²⁰

²¹⁶ Han, B. *Foucault’s Critical Project*, Ibid., 66.

²¹⁷ I do not wish to go so far as accusing Han of constructing a straw-man argument (I too am attempting to stretch the archaeological method to its discomfort, and in any case hers is a thesis of such philosophical rigor that it requires far more attention than these paragraphs); but one must bear in mind that the decision has been made over the historical *a priori* in advance in light of this “critical question”.

²¹⁸ Han, *Foucault’s Critical Project*, 66 citing Dreyfus and Rabinow.

²¹⁹ Ibid. Han is citing *Archaeology of Knowledge*.

²²⁰ Ibid.

The threat of tautology and regression can only hold, however, if we are unable to distinguish one level of rules from another on the basis of their *epistemological significance*. It is not unsurprising that a philosopher considers one set of rules as good as the next, and both sets of rules as (putatively) prescriptive of true knowledge. Han's analysis passes over, however, the fact that the historical *a priori* is not simply a 'set of rules', but a *form of positivity*²²¹. Certainly, the *a priori* component to which it refers *is* a "set of rules"; but Han has not separated the respective parts of the historical *a priori*, collapsing the entire figure into its 'prescriptive' half.

Certainly, she ventures that "it is most probable that... Foucault is not committing himself to any transcendentalist claims and simply intends his "historical *a priori*" to indicate and underline the possibility of studying discourses in an autonomous way, through their "own type of historicity""²²², but this 'historicity' appears to be of very little significance, defining perhaps a *modality* of the *a priori*, but having no impact upon the epistemological function of the latter as a 'condition of possibility of knowledge', and merging with other similar attempts to substitute the Kantian version of the same. "Indeed," she says,

"although it is now understood as "positive" and its "*a priori*" aspect only serves to mark the autonomy of the discursive, the historical *a priori*, as the "rule" and the "principle" that allows us to account for the "reality" of statements, must nonetheless involve a specific kind of determination, which must be distinct from causal determination – as otherwise the very possibility of archaeology as the study of statements at their own level would vanish"²²³

Han is right, of course: this specific kind of determination "distinct from causal determination" is necessary in order to speak of serious statements without reducing them to power. It forms the object not only of archaeology but also of legal positivism; it is what causes Dreyfus and Rabinow to reduce archaeology to a 'radicalised human science'. Han's reduction is more obtuse still: she simply appears to assimilate the historical *a priori* to the category of Foucaultian attempts to displace the transcendental conditions of true knowledge. That it should refer to 'conditions of reality' of statements is unworkable simply because every attempt Foucault makes to displace transcendental determinations is unworkable: for the archaeology is presented as a theory of knowledge, and the historical *a priori* is not considered in any other light.

If Dreyfus and Rabinow are somewhat more equivocal about the status of the archaeology, this is precisely owing to their suspicion that it constitutes a type of 'human

²²¹ See my discussion, above.

²²² Han, *Foucault's Critical Project: Between the Transcendental and the Historical*, 65.

²²³ Ibid.

science': it is not surprising that it should share in the ambiguous nature of the latter. But although the *Archaeology* is not being read (as it is in Han) as a rigidly epistemological enterprise, the treatment of the historical *a priori* in Dreyfus and Rabinow's critique shares with Han's analysis its emphasis on the *a priori* over the 'historical'. We have already seen that they suspect the emplacement of second-order rules, that is, the regularities that pertain between conscious first-order rules of discursive practice, upon some "nonconscious" platform which archaeology brings to knowledge. This platform, in their understanding, acts as a necessary linchpin, the only form of stabilising the *ex post facto* use of 'statements' in their facticity to discern the rules that prescribe their possibility. This is an inflection of archaeology's positivist structure: "any discourse that seeks to establish the ground of its own possibility and that of all knowledge in itself alone is subject to the double"²²⁴ – subject, that is, to the tension between the 'positive' aspects of knowledge and experience and the 'fundamental' conditions for their existence, a 'double' that inheres in the age of Man, the indelible tension between the empirical and the transcendental that representation alone was adequate to arrest. The archaeology, they explain, "attempts to pass from an *analysis* of positivities into elements to an *analytic* providing the ground of the possibility of its own method and subjects"²²⁵; and the second-order rules, now elevated to the status of an analytic, are (notwithstanding their explicit distinction, in Dreyfus and Rabinow's reading, from "the transcendental rules of Kant"):

"...presented as the *conditions of occurrence* of statements, so that once the archaeologist is in possession of the rules describing a discursive formation he can see that those types of speech acts which were actually uttered and taken seriously were the only ones that could have been seriously entertained at the time."²²⁶

If the historical *a priori* is the figure in which these second-order rules are given, this figure is nothing more, according to Dreyfus and Rabinow, than a reflection of how "the archaeologist passes from post hoc positivities to a priori foundations...from description to prescription, from regularities to regulation, from empirical analysis to archaeological analytic..."²²⁷. In assuming that the purpose of the archaeology is directed towards an *analytic* – towards, that is, a scheme whereby the conditions for knowledge are articulated – the only sense in which the *a priori* is 'historical' is that it shows, as a matter of *conditionality*, that certain types of speech act "*were the only ones that could have been seriously entertained at the time*". These speech acts and no others: the emphasis is placed on the prescriptive nature of second-order rules, the manner in which they

²²⁴ Dreyfus and Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics*, 91.

²²⁵ *Ibid.*, 92.

²²⁶ *Ibid.*, 92–93.

²²⁷ *Ibid.*, 93.

delimit utterances, allowing some and disallowing others, at a particular moment in time. In other words, Dreyfus and Rabinow appear to suspect that the archaeology is, despite Foucault's definitions to the contrary, a method of discerning the *a priori* conditions for formalising discourse in a particular era. Thus the emphasis rests on the *a priori*, on determining what these rules were, in showing the *delimitation* of discourses, the restrictions on serious speech, at a given point in time. The archaeology is, in this reading, a search for an analytic, for conditions of knowledge – just as it was for Han. And whether these 'conditions' pertain to 'occurrence,' to 'reality' or to 'possibility' is in the last instance a matter of semantics: the archaeology is in this reading a history not *of knowledge*, but *for knowledge*.

Opposed to this attitude, to the assumption that the object of archaeology consists in determining *which rules* of formation were in operation at which time, there is a third position that reverses the priority of "history" and *a priori*, favouring the former over the latter and, in so doing, asking a different question. On this understanding, the *Archaeology* is not a philosophical enterprise – it is not concerned with tracing conditions of possibility of knowledge in their various modalities. Rather, it is an historical project. This perspective is not concerned with the prescriptive nature of those conditions under which one may speak seriously, but with the sheer existence of those conditions: that is to say with their ontology. Insofar as archaeology-as-history is also an analysis of limits and irruptions, it is not primarily interested in the constraints these first-order rules of formation place on discourse, but in the ontological constraints that they suffer themselves. This is what it means to assign to a grouping of second-order rules its 'positivity': it is not to suggest that the second-order regularities have any epistemological value, that they are in any way engaged in something like a linear succession of conditionality that we might trace from regularity, to rule of formation, to statement (we encountered this same corrupt linearity in Kelsen's Pure theory above, and with it the same engagement with the 'future anterior' that Dreyfus and Rabinow assign to the illegal crossing and uncrossing of the line between prescription and description, the rules of formation and the statements from which they are inferred). It is instead to denote *simply* that the regularities between conscious, first-order rules of formations do not enjoy a universal existence, but a limited existence determined by the life of that positivity which is in turn created, by virtue of the archaeological method, out of the regularities between them.

One proponent of this attitude is Gary Gutting, in respect of whose historical reading of Foucault's work Han often polemicizes her central thesis. Gutting, for his part, cites Dreyfus and Rabinow as his interlocutors when he claims that alongside a "rationalist" philosophical

approach²²⁸, Foucault's project "is also historical and critical; that is, it is based on the idea that reason itself is a historical phenomenon whose norms are always open to challenge through critical analysis"²²⁹. He concedes that in many cases the work appears to be an "historical counterpart of structuralism", and therefore a form of human science; and that such a reading is exacerbated by Foucault's "complex categorisation of the "rules" governing discourse". Nevertheless, he argues, "even where the force of the structuralist temptation is at its strongest... there is reason to think that Foucault never entirely succumbs to it"²³⁰. At the outset of our discussion of the archaeology, we saw that it was motivated by the need to respond to the anthropocentric historicism that engendered categories, traditions and modalities that were unacceptable for Foucault's critical purposes. We saw that the relationship of history and the human sciences was compounded by the centrality of the subject; and yet we also saw that historicism was of key, and therefore auspicious, significance in showing that "all the human sciences, including itself, have validity only within a restricted temporal and cultural domain"²³¹. It is in this light that Gutting claims that the archaeology "is primarily a method of concrete historical analysis, not of general social scientific or philosophical theorising"²³²; and that, instead of falling under the rubric of the human sciences, it "can at best be regarded as another counterscience....In fact, it seems likely that ... archaeology would find its natural place as a counterscience to the modern discipline of history"²³³. If this is true, then as with modern history, it would be directed towards showing the 'restricted temporal and cultural domain of validity' of the discourses it studies, with the exception that, unlike a non-critical history, it would "give up its [own] "claim to validity within the element of universality""²³⁴.

Their 'restricted temporal and cultural domain of validity': how does this help us to re-imagine the historical *a priori*? First, if the 'domain of validity' coincides with the regularities between first-order rules; if a group of second-order regularities can be understood as a 'positivity'; then an historical counterscience will suggest that those prescriptive rules exist only for the duration of that positivity with which they are identical, and only in the epistemic location to which it belongs. These secondary groupings are therefore given an historical existence, they are significant *only* in their subjection to change over time and space: they have their own limitations, their own curtailment, by virtue of the fact that they exist only *historically*. Far from seeking out a first set of rules in a concatenated sequence of prescriptive and descriptive rules

²²⁸ Cf Couzens Hoy, D *supra*., n.206

²²⁹ Gutting, G *Michel Foucault's Archaeology of Scientific Reason*, 266.

²³⁰ *Ibid.*, 267.

²³¹ *Ibid.*, 268.

²³² *Ibid.*, 267.

²³³ *Ibid.*, 268.

²³⁴ *Ibid.*

and regularities, archaeology constructs groups of second-order regularities in order to demonstrate the rarity of discourse, not its force. Instead of analysing the system of dispersion in order to account for the conditions under which ‘serious meaning’ is (uncomfortably) given to “representation”, it apprehends this system of dispersion for its *historical* significance. Such is the inference from the *Archaeology* itself, insofar as Foucault says of the historical *a priori* that, “in short, it has to take account of the fact that discourse has not only a meaning or a truth, but a history, and a specific history that does not refer it back to the laws of an alien development”²³⁵.

In fact, Foucault says, not only does discourse *have a history*, but this is a “history...that belongs to it [the discursive formation] alone, even if it is not entirely unrelated to other types of history”²³⁶. For Dreyfus and Rabinow, the movement from analysis to analytic can only be executed by a crossing of the line between description and prescription, past and future: this tension is resolved in the element of prescription and the orientation of rules towards future conduct (albeit for a particular era), in which the historical *a priori* is placed, only to be found wanting. It is unsurprising, then, that, in Dreyfus and Rabinow’s understanding, “the claim to have discovered a “historical *a priori*,” bears more than superficial resemblance to what Foucault calls... the “Fold [in which] the transcendental function is doubled over so that it covers with its dominating network the inert, grey space of empiricity...”²³⁷. But when we treat the conditions of existence of statements as an historical object, if we determine the rarity of a discourse by the history that “belongs to it alone”, then in the final instance the analytical value of the constellation of secondary-order rules does not stem from its ability to bring conditions of ‘representation’ of ‘serious meaning’ to scientific knowledge, but rather from the fact that it is operation of historicism: the articulation by an historical science of the complete history of that formation. As an object of history, its lifespan can be brought to knowledge, but only insofar as we can show it to be a fragment of our own history. It is in this way alone that the archaeology corresponds to its Kantian namesake: not because it seeks out formal *a priori* of knowledge; but because under its gaze alone will every discourse, in its self-evidence, in its claim to truth and universality, in the force of its rules of formation be forced into the limits of the history that archaeology gives to it. Only under the auspices of this method is every discursive formation at the same time a unity and a *ruin*: for its discrete history is exceeded by our own, and it appears as a unity only by virtue of that very fact.

To respond, then, to the charge that archaeology is a ‘radicalised’ human science: first, the historical *a priori* would have to be incorrectly stated as an epistemological *a priori* that

²³⁵ Foucault, *Archaeology of Knowledge*, 143.

²³⁶ Ibid., 144.

²³⁷ Dreyfus and Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics*, 93 citing *The Order of Things*.

operates at a particular point in time to impose limitations on what may be said or practiced seriously; secondly, the correct categorisation of the historical *a priori* accepts as given that certain things and no others are taken seriously, but turns its attention to showing the rarity, the historical limitations, of that situation. Third, this distinction hinges upon the characterisation of the regularities that pertain between rules of formation: in the first reading, they are part of an unthought structure that archaeology brings to light; in the second, they are given a form of ‘positivity’ that historical practice creates of its own accord. In contrast to putative ‘unthought’ conditions in which we must, at some level, believe and which we must ‘recuperate’ into our own practice only to find that the arbitrariness, the seriousness, of the rules are thrown into jeopardy as the element of ‘power’ involved in serious meaning frustrates the entire process; the historical *a priori* allows the seriousness of statements and the rules of formation to have their proper force, only within the confines of the lifespan, the historical rarity, of a discursive formation.

One obvious problem remains. So far the archaeology opposes not a ‘radical’ human science, but an *ordinary* human science – like the categories of “myth” that acknowledge the *power* of a set of beliefs, their law-like significance, only insofar as these are things of the past. The relationship of the archaeologist to the historical *a priori* cannot, if it is to have significance for law, be equivalent to the relationship of the subject of history and historicism. There must in the last instance be a way of bringing the historical *a priori* into the present, to show that it is not simply a product of historicism, but a function of history. This can only be demonstrated, however, when we consider its operation alongside the power which gives seriousness to the statements whose very ‘conditions’ it aims to capture, and which must not only be distinguished from the causality of that power, but situated (given the frustration of attempts hitherto to ground rules in their own unthought conditions) in a workable relationship to the same.

Towards a Legal Archaeology

In several aspects of its structure and its concepts, Foucault’s archaeology finds its equivalent in certain strains of legal positivism. One could imagine that in the place of ‘norms’ there are ‘statements’; in the place of ‘systems of validity’ we find ‘discursive formations’; and the objective in each case is to bring to knowledge the conditions under which otherwise arbitrary rules have their force and self-evidence. Like rules in Hart’s thesis, the statements involved in discursive formations share linguistic parity with ‘speech acts’ in linguistic theory. If Kelsen’s Pure Theory is better undertaken as an ontology of norms, archaeology meets this challenge in its search for conditions of existence for statements. Moreover, the entire scheme of serious statements are

accounted for by virtue of their emplacement on a plane of determination, a grouping of rules that obtain added significance as ‘system’, comprised out of second-order regularities that persist between the first-order ‘laws’ that are available for use. But these parallels are not sufficient to demand a legality for archaeology: something more is needed to show how archaeology achieves what legal positivism could not – a “Law of law” that is placed in a dimension out of reach of any frustration by the arbitrary nature of rules.

The turn to the archaeological method had the overarching objective of replacing the unworkable representation of the law in the ‘unthought’ with an alternative understanding both of ‘law’ and of the use to which the self-referential system on which it might find its conditions of existence should be put. That is to say, the facticity of the ‘statement’, the abstraction on the archaeological level of all that can be done and said with seriousness at a particular place and in a particular time, substituted for the problematic “legal norm”, bracketing ‘seriousness’ and ‘meaning’ in order to ascertain not the system according to which arbitrary rules could be represented in the unthought; but rather the historical limits of the discursive formation to which a specific set of ‘serious meanings’ belonged. The historical *a priori* supplanted the ‘system of validity’ as the statement supplanted the ‘norm’, and in this way the force and arbitrariness of the serious statement was able to be grasped in the historical modality of its existence. However, two significant distinctions separate the archaeology from legal positivism proper, for its aim is wider than simply that of ameliorating the frustrations in the latter. First, the nature of the law is radically altered. Insofar as archaeology takes upon itself the task of disbanding all the usual unities and categories that are used for classifying discourse, a legal archaeology will not presuppose that the epistemological criteria for ‘law’ have been announced in advance. The law is not encountered as a continuity of the parameters which are in any case contentiously set out in so many epistemological treatises and counter-treatises – which refer at times to proper authority, at others to justice, or simply to ideology – for to seize upon any such criteria *ab initio* would defy every archaeological principle. The line between legal and non-legal discourses must therefore fall away, for every collection of statements corresponds to the ‘historical *a priori*’ in the same way. For this reason, the archaeology fails to attain the purity that was once sought for legal science: it is a method that may be used in several contexts²³⁸. Perhaps, however, in a manner similar to deconstruction, we can think of the legal use of archaeology as its operation “*par excellence*”; but there is also a stronger case to be made, that in its coincidence with genealogy, the archaeology will serve to bring to light the ‘legal’ aspects of governmental power that have replaced or exist in tandem with sovereign power. Secondly, unlike the liberal-ideological task set

²³⁸ Foucault envisages several types of archaeology, in excess of that which is directed in *Archaeology of Knowledge* to the specific subject of the human sciences.

out for traditional strains of legal positivism, identifying the ‘law of law’ is no longer an exercise in legitimation, but instead entails an analysis concerned with showing the limits whereby a set of serious utterances are considered legitimate. Utterances are not valid as statements by virtue of their relationship to the system of regularities to which they archaeologically ‘belong’: these secondary regularities are not prescriptive of first-order rules of formation. The legitimacy of statements is always bracketed, albeit that the fact of this legitimacy is neither denied nor unimportant. Nonetheless it is worthwhile to consider the “fact of legitimacy,” if it is to be everywhere assumed, in order to dispense with the idea that it must be accounted for in the course of the archaeological analysis.

First, legitimacy is not to be demonstrated by archaeological means because the latter evades the domain of hermeneutics. It is Foucault’s express contention that, in using archaeology, we are not looking for the deep meaning of things: we do not imagine that this method will reveal to us anything more hidden, more significant, about the utterances it treats as ‘statements’²³⁹. Archaeology is not concerned, then, with the promise of truth or of justice that might lie behind the text of the law. It deals with serious meaning and not with sense-meaning, not with the domain in which words are adequate to things, the domain of language. At the same time, we are not, as with structural linguistics, accounting for the possibility of meaning: we are not claiming that serious meaning owes its *force* to the system of regularities that surrounds it. We have already seen that the regularities between conscious rules of formation are not themselves *prescriptive*. We are showing the limits, rather, of the lifespan of the excessive meaning of a set of utterances; we are referring throughout to the empty signifier which belongs instead to the question of “poststructuralism”.

Rather, since the statement is treated in its facticity, its “legitimacy” is simply already assumed. Just as the statement coincided with the “fact of language”, it also coincides with the fact of its own legitimacy. That does not mean that there is no other story behind this legitimacy, or that there is no other means of accounting for it. Since the attitude towards the coincidence of serious utterances with power is relaxed in the archaeology in a way that eludes the legal positivist tradition, the task of accounting for the incidence of legitimation is happily left to other areas of analysis. Of course, the archaeological method must prove its necessity over and above the connection of power and knowledge: and it is not universally acknowledged that it does. In the next chapter we will consider in detail the continued necessity of the historical *a priori* in the analysis of knowledge in light of the causality, in the form of a history of power made traceable by genealogical means, of serious speech.

²³⁹ Indeed, this is one half of the central thesis put forward by Dreyfus and Rabinow, in Dreyfus, H and Rabinow, P *Michel Foucault: Beyond Structuralism and Hermeneutics*.

Nevertheless, let us briefly consider the distinction between the historical *a priori* and any causality that runs parallel to this necessarily historical object. I have indicated parenthetically throughout this chapter that, if what we look for in a “law of law” is a scheme wherein we can arrest the tension between the arbitrary incidence of power and the universality of significance, truth or justice: we are dealing in fact with the ubiquitous grammatical form of the law. It is now time to remove those parentheses. In the previous chapter, we saw that Agamben drew into line his own concept of the signature with Derrida’s *différance* and Foucault’s statement, all under the heading of the future anterior. This grammatical form expressed in each instance a modality of grappling with the empty signifier. In Foucault’s case, the latter, it was suggested, took the form not of an arbitrary event linked with a futural promise, nor with a radical lack that awaited fulfilment beyond a point of indistinction; but rather a doubling-over of ‘meaning’, a ‘meaning upon meaning’, what we have, following Dreyfus and Rabinow, referred to as ‘serious meaning’, encountered in the present. Insofar as the statement is always-already ‘legitimate’ under the discursive formation to which it belongs, the arbitrary and the universal, which is to say the force of its causality and its acceptability, coincide. I suggested that, in the context of the statement, the polarities of the ‘future anterior’ would be stacked up on top of each other, rather than drawn out dialectically or “messianically” repressed. In Foucault’s words,

“We are studying statements at the limit that separates them from what is not said, in the occurrence that allows them to emerge to the exclusion of all others. Our task is not to give voice to the silence that surrounds them, nor to rediscover all that, in them and beside them, had remained silent or had been reduced to silence. Nor is it to study the obstacles that have prevented a particular discovery, held back a particular formation, repressed a particular form of enunciation, a particular unconscious meaning.... But to define a limited system of presences”²⁴⁰

Now, the historical *a priori*, understood as the discursive formation in its historical entirety, is precisely the context in which the arbitrary and the universal, power and right, coincide. While in deconstruction the futural promise of justification folds forever back into the foundational event, the future-universal-justification and the anterior-arbitrary-causation coincide, not for a single moment, but for a suspended moment, in the historical *a priori*: for as long, that is, as the regularities between rules of formation, as the discursive formation itself, remains in force. The historical *a priori* indicates not only the limits of what can be seriously said to the exclusion of other things, but rather, and more subtly, the limits beyond which the arbitrary and the universal cease to coincide in respect of a series of signs. The ‘law of law’ that I claim for the historical a

²⁴⁰ Foucault, *Archaeology of Knowledge*, 134.

priori coincides with the historical duration of this coincidence of future and anterior. Neither by simple causality, but the appending of right to causation; nor by signification that can be found in the ‘unthought’ of Man, but in the fragility of a discursive formation the lifespan of which is not sheltered from the ingress of power – can we find the context in which we place the conditionality of the statement. If, against the vast horizon of history, the historical *a priori* of every discursive formation is also the site of a ruin, the statements of which it is comprised are also to be considered in their temporality which is neither a timeless monument nor a scintillation:

“statements are reconsidered in the *remanence* that is proper to them, and which is not that of an ever-realizable reference back to the past event of the formulation. To say that statements are residual... is not to say that they remain in the field of memory.... It means that they are preserved by virtue of a number of supports and material techniques...certain types of institutions...certain statutory modalities...”²⁴¹

The law-object, the statement considered in the context of the historical *a priori* in which it is given, belongs as a matter of right to archaeology. It is the only method in which the legitimacy of serious utterances can be presented in a context that secures the adequacy of universality and arbitrariness, of right and power, without collapsing the whole edifice that secures the law into one side of this dichotomy or the other.

Excursus: Another Critical Legal Positivism

Since I am proposing that a ‘legal archaeology’ reflects the tradition of legal positivism, but that it does so in a radical manner that lends itself to critique, it is incumbent to address the fact that a ‘critical legal positivism’ has already been constructed, by Francois Ewald, partially in light of Foucault’s wider work. Like legal archaeology, Ewald’s positivism lends itself to the critique of power, by attempting to demonstrate the manner in which it is legally obfuscated. And this obfuscation in turn takes the form of a ‘reflexivity’, a systemic form of legal positivism that bears certain uncomfortable resonances with the structure of any putative ‘legal’ archaeology. Uncomfortable, because the approach that it espouses demands an un-Foucaultian, un-critical relationship to historical practice; and which nevertheless, given its proximity to the concerns of archaeology, especially insofar as, in the next chapter, it must demonstrate its adequacy to the Foucaultian analysis of ‘power’, demonstrates the stakes involved in any attempt to construct a

²⁴¹ Ibid., 139.

theory of law that is compatible with the ubiquity of power in Foucault's later work. In an essay dealing with the interrelationship between the 'norm', governmental power and the law, he examines the emergence of 'normalisation' as a phase in the history of thought, insofar as it is definitive of modernity, which he determines as the "normative age"²⁴². Foucault had identified the 'normalising' practices of the various modes of governmental and disciplinary power; here, Ewald elaborates upon the extensive significance of the 'norm' in the edifices of modern thought, including but not limited to the law, but wherein the law is nevertheless its paradigmatic instance.

Disallowing the suspected total rift between the 'normalisation' techniques of governmental practice and the 'law' in secondary Foucaultian literature, Ewald explains that the quality of the 'norm' is only opposed to the 'juridical' – that is, to repressive monarchical power. Law itself, however, is not to be reduced to the juridical: its form changes in line with the ingress of 'normalisation' in science and discipline; and normative law, which "can also function by formulating norms, thus becoming part of a different sort of power [opposed to sovereign power]"²⁴³ enjoins in the generalised "reciprocity between society and the norm" in modernity, for which "[t]here can be no society...without norms, codes, common standards of measurement..."²⁴⁴. Indeed, as normalisation came to the fore in science and discipline, new methods of socialisation developed: the increasing importance of 'insurance' and 'social welfare' instituted methods that would record factual regularities from which averages could be attained, and these 'averages' in turn would be institutionalised as a means of justifying the "just distribution of risk and fortune"²⁴⁵. What had been until the nineteenth century a logical or mathematical concept proper to the set rule and the engineer was now the principle of newly emergent forms of social solidarity²⁴⁶.

In particular, judgement was now to be informed by a self-reflexive observation of a social group and directed towards the attainment of a median justice, in a movement that would displace the imposition of right and duty 'from outside', doing away with the requirement of social 'obedience' to a higher entity; and while there is 'parliament' in such an arrangement, there is no place for the 'legislator':

²⁴² Ewald, "Norms, Discipline, and the Law," *Representations* No. 30, Special Issue: Law and the Order of Culture (Spring, 1990), 138-161, at 141.

²⁴³ *Ibid.*, 139.

²⁴⁴ *Ibid.*, 149.

²⁴⁵ *Ibid.*, 147.

²⁴⁶ *Ibid.*, 151.

“The law is no longer valid as an expression of the general will or the common interest. Rather, it is valid by virtue of its normative quality”²⁴⁷

The law is no longer based on ‘universal values’, but upon the ‘group’s observation of itself’; its judgements are meted out not to achieve a prior notion of the good but to ‘ensure the community’s respect for a common standard’²⁴⁸. Thus the norm “eliminates within law the play of vertical relations of sovereignty in favour of the more horizontal relations of social welfare and social security”²⁴⁹. And so the nature and objective of the law is altered in modernity in accordance with the prevailing principle of social organisation. Moreover, the law does not interfere in the self-reflexive *form* of this principle: rather, it reflects it. In this way, Ewald establishes the link between normativity and law in modernity, in which the latter is characterised by the former; and, at the same time, he suggests that legal discourse and practice is in the service of these normative ends, forming part of the wider picture of social ‘solidarity’, conforming to the self-reflexive structure of the social and guaranteeing its importance. Thus, the question of the law is subordinated to the self-reflexive practice of normalisation. Two things emerge from this thesis. First, the “law” here takes up the modality of ‘normalisation’ in a way that positions it next to the operation of normalising techniques of power, working in the service of the latter. The self-defining discourse of ‘law’ is therefore ‘instrumental’ (in the Marxist sense) in the wider scheme of the practices of normalisation.

A legal archaeology would agree with this synopsis in one respect: insofar, that is, as ‘legal discourse’ operates in the service of a wider scheme of governmentality, as ‘discursive formations’ inform the exercise of power. But this is as far as a legal archaeology would permit Ewald’s analysis to hold true: for the former would then subvert the priority of ‘normalisation’ over the question of ‘law’; and the belonging of self-reflexivity to a designated era in history would be displaced by a generalizable understanding of ‘law’ in its own historical dimension. The reason for the relative positioning of these problems in Ewald’s analysis can be traced to his broader thesis on ‘critical positivism’, set out in an exemplary antecedent work, in which he again states that we live in an epoch of ‘social law’:

²⁴⁷ Ibid., 155.

²⁴⁸ Ibid.

²⁴⁹ Ibid.

“By ‘social law’ I do not mean only the legal disciplines that deal with work and social security. Social law cannot be defined by the objects it deals with, but instead by what makes these objects capable of legal treatment”²⁵⁰

Social law is not the general form of ‘law’: it instead “designates a certain technique...articulated round a certain type of legal rationality”, particular to our era, in which there is no longer any possible reference to natural law or universal principles. Social law, Ewald explains, coincides with the epoch of the human sciences, “[a]nd man in the human sciences loses transcendental power and is reduced to the ineradicable particularity of his conditioning”²⁵¹. As a result, “[m]en are bound to themselves,” by means of a social bond without external guarantee, necessitating “a network of solidarity on which they depend and from which they draw their identity”, in a manner which “ruins the possibility of the universal”²⁵². This gives rise to the paradoxical situation in which law “must find the conditions of its own possibility, for the objectivity of its rule of judgement, within itself”. There is a logical need in every system of law, social law included, to reflect upon and regulate the rules and principles that determine its content and practices. Ewald refers to this as the ‘rule of judgement’, or the ‘law of law’: it constitutes the rule, devoid of particular content and even of a particular form, whereby the legal system can be fixed, unified, rendered legally coherent. Hitherto, the ‘law of law’ has been relegated to the universal sphere of the ‘right’ or the ‘common good’, but this is not a necessary relegation: to insist upon it is in fact to confuse the question of the ‘law of law’, which has no particular content, with an abstract, universalisable concept of ‘Law’.

Social law does not demand such universal, objective criteria. The logical need to ground the system of law proceeds reflexively; law is able to justify itself retroactively by referring back to its own tradition. The example is led of the postwar use of legal positivism: in the absence of a transcendental authority or any theoretical precedent for the conducting of the Nuremberg trials, and without wishing to annihilate the very institution of the rule of law (as the Nazis had done by ‘suspending’ the latter), “[i]t was for practice to find the solution that the theory had been unable to supply”²⁵³. ‘General principles’ of law were duly identified “in which even the acts of the legislator could be condemned”²⁵⁴; principles which were held to be extant albeit latent in the very substance of law. Such principles “have no other support than the positive practices of law

²⁵⁰ Ewald, F “The Law of Law”; in Teubner, G (ed) *Autopoietic Law - A New Approach to Law and Society*, (1988) (Berlin, Walter de Gruyter), 43.

²⁵¹ Ewald, “The Law of Law,” 44.

²⁵² Ibid.

²⁵³ Ibid., 46.

²⁵⁴ Ibid.

themselves. They are neither superior nor anterior to law. They are law itself, reflecting on itself on the basis of its own tradition.”²⁵⁵ The reference to its own practice and tradition engenders a reflexive self-grounding of the law; and “[i]t is in the form of the general principles of law that the essential reflexivity of law is practiced in the epoch of social law”²⁵⁶. Social law is thus characterised by its continuous reflexivity, allowing it “to bind itself, to preserve its identity while being receptive to change”²⁵⁷.

Whereas Kelsen’s Pure Theory of law, of which the autopoietic form of ‘social law’ is derivative, satisfied the logical requirement for a ‘law of law’ by referring to a ‘fiction’ at the apex of the system, the reflexive form of ‘social law’ changes tack, albeit while remaining within the boundaries of positivism. Since the system grounds itself not by means of a logical, theoretical ‘imagination’, but by reference to its own practice, Ewald arrives at the awkward conclusion that, in the context of social law, “there is no law in a law of law”²⁵⁸. There is no universal principle, only the fact of what has gone before; only, that is, a process whereby the validity of the legal system is guaranteed simply by the fact that such reflexivity will take place. In autopoiesis, “the knowledge of the object is never anything but the way in which the object itself reflects upon itself”²⁵⁹: *mutatis mutandis* for social law. If knowledge and reflexivity are one and the same, the epistemology of law is reducible to how it understands itself. It follows that we cannot refer *ab initio* to an ontology or epistemology of law; we may only defer to those practices that identify themselves as ‘law’, and which supplement that ontology by virtue of the tautology of their own ‘legal’ practices.

But if this is the case, then perhaps the entire being of this social law could be grounded upon something more consistent than its satisfaction of the ‘logical need’ for a law of law? Autopoiesis carries the inflection of the grammatical form of the future anterior: to take the law as a unified object, one could arrest the dialectical reflexive process and state that, at any moment in time, the whole edifice of social law is poised to advance on the basis that whatever it declares ‘will have been’ valid on the strength of its emanating from a system that will self-reflexively describe itself to include that declaration as an expression of what it already, latently, contained. Only on the condition this self-understanding, for example, will the legal tradition have survived the establishment of the Nuremburg tribunals unaltered.

This is not, however, how we are invited to think about social law, or about ‘normalisation’ for that matter. Ewald’s work conjoins the proliferation of the ‘norm’ in the

²⁵⁵ Ibid.

²⁵⁶ Ibid.

²⁵⁷ Ibid.

²⁵⁸ Ibid., 49.

²⁵⁹ Ibid., 43.

context of modern social organisation with the temporally-confined phenomenon of social or autopoietic law. The consistency of these theses depends upon the specificity of the norm to modern techniques of governance on one hand; and upon the pre-eminence of the 'law of law' in providing for the unity and, by extension, the existence of a legal order, on the other. But precisely owing to this juxtaposition of modernity and legality, we find something 'arbitrary' in Ewald's version of positivism: his confinement of positivism and reflexivity to the sphere of modernity coincides, somewhat uncomfortably, with the assumption of a universal category of 'law'. Indeed, as Minkinen suggests:

"By reassembling the disintegrating object back together in accordance with the demands of legal positivism, Ewald forces law and history into a reconciliation that reinstates the non-historical element that he was out to eradicate. Ewald understands essentialism as the neglect of history, but he comes to terms with his own epoch only by disregarding the traits that mark its specificity. Ewald objectifies the position of the philosopher 'beyond history' thus he 'reduces his analytics of juridical thinking into a specifically non-Foucaultian philosophy'."²⁶⁰

It is Ewald's uncomfortable position as epistemologist-historian that seems to engender this difficulty. By contrast, a legal archaeology will re-cast the question of law in a manner that admits of universality *only* because it is conjoined with the very *experience* of history. An archaeologist must, on the contrary, attempt to situate herself as, in the reverse, an historian-epistemologist.

Taking first, then, the problem of the norm: in the society-wide conduct of normalising practices, the interpretation of an objective standard of measurement, the 'norm', is neither subjective, nor does it appeal to any metaphysical principle. As with the theory of statements, the formation of norms is premised upon the observation of phenomena in their sheer factuality²⁶¹; and the processing of these facts in order to establish the 'norm' that pertains between them is "not a question of unmasking them or interpreting them because for the normative way of seeing, a fact refers to other facts and not to an original cause". "Thus," explains Ewald, "in the normative order one simply moves from one visible surface to another, indefinitely"²⁶²; and so the normalising process emerges from the same quasi-phenomenological premise as the first stage in archaeology, in statements are recorded in their facticity. However, unlike the archaeological bracketing of statements, in Ewald's analysis norms are, problematically, "anything but natural": in the practice of normalisation, "facts are never simply given" and, in

²⁶⁰ Minkinen, *Thinking Without Desire*, (1999) (Oxford, Hart Publishing), 108.

²⁶¹ Ewald, "Norms, Discipline, and the Law," 155.

²⁶² *Ibid.*, 156.

making sense of these facts, a normalising discourse, such as the science of probability, must engage in a type of interpretation, in which the ‘norm’ is derived from the regularities between the facts observed: just as rules of discourse are derived from the positivity of statements.

Such an articulation of the norm, says Ewald, is grounded in an *intersubjective* process, in the formation of a ‘common language’ that establishes the objectiveness of the rule. Intersubjectivity is a form of securing an objective interpretation of phenomena only under the aegis of a simultaneous phenomenological practice. If we are to follow the Husserlian sense of ‘intersubjectivity’, normative facts would attain their purity and objectivity by virtue of their inclusion in a type of phenomenological investigation. This in turn would insist upon the discovery of a ‘lifeworld’ against which to place the objectivity of the ‘norm’; and such reference to the lifeworld is only possible on the condition of a transcendental consciousness, a universal form of phenomenological experience. In short, the success of normalising discourse, its prevalence in a society and the consistency of its self-description depends upon its interrelationship with a shared and transcendently grounded set of conditions. The objectivity with which facts become norms thus begs a higher philosophical question, the very existence of which disbars the positioning of ‘normalisation’ as a concept at the apex of an epistemological hierarchy. The facts under observation are not severable from the ‘norm’, but connected to the latter through this interpretive process. If this is a method of social organisation, it also sails very close to a ‘republican’ dialectic reminiscent of a Habermasian form of legal pragmatism²⁶³, together with everything this entails²⁶⁴. And so when Ewald suggests that there is, at a certain moment in time, a type of society characterised by the ‘normalising’ process, it is unclear whether we are to *believe* that society is thus characterised, and therefore to adopt some sort of affirmative attitude towards the phenomenological criteria under which it must do so; or we *disassociate* our position from the society under observation, in which case we require a higher set of criteria to account for the shifting *character* of the social. We cannot describe ‘normalisation’ as a generalised social practice: we must constrain it as a type of rationality only, and send it back to the categories of discipline in which Foucault finds it; for Ewald’s efforts to expand its significance to the character of a society yield untenable results.

The statement, however, is not subject to such conditions, since it does not share an ontological space with those utterances and visibilities from which its existence is deduced. The facts of serious speech acts in respect of which the statement is adduced are ontologically

²⁶³ See, e.g., Cook, D “The Talking Cure in Habermas’ Republic.” *New Left Review* 12 November-December 2001, 135-151

²⁶⁴ See, e.g., Lasse Thomassen’s critique of Habermas and his opposition of Derrida’s “justice to come” to communicative reason. Thomassen, L “Within the Limits of Deliberative Reason Alone: Habermas, Civil Disobedience and Constitutional Democracy.” *European Journal of Political Theory* 2007 6:200

severable from the latter. And while the ‘rules of formation’ of statements are to be found by the paradigmatic placing of one statement next to the other much like the ‘norm’ is determined from the description of regularities, these rules of formation are discovered only within the boundaries of that distinct level of analysis. The difference is again one of “meaning”: whereas the ‘norm’ deduced from the regularities between facts must *lay claim* to its prescriptive significance, its ‘meaning over meaning’, in the moment it is announced; archaeology operates on the basis that the statements it discovers are already ‘prescriptive’. The rules of discourse established between statements add nothing further to their seriousness at the first level, the level of real life and social interaction; it simply asks in what way – given that there will exist, for as long as there is knowledge, a *function* of seriousness – this serious meaning is arranged. At the same time, however, the very level upon which these rules interact with statements – the only level in which statements exist, in which forceful utterances exit the fold of the social and come into their own right – is a level of excess: the quasi-epistemological level upon which the ‘meaning of meaning’, the serious function of utterances, becomes solidified, emerging in its own right as ‘positivity’.

This brings us to the second point: of distinguishing the archaeological ‘law of law’, the historical *a priori*, from that belonging to Ewald’s ‘critical positivism’. David Schiff and Richard Nobles have presented the reflexivity of autopoiesis as a ‘paradox’ insofar as “self-descriptions have to present part of the system as the unity of the system”²⁶⁵. In this sense, the reaching of the legal system back into its own tradition to find, continuously, its own general principles is precisely the source of the schism between ‘future’ and ‘anterior’, precisely the cause of the untenable priority of epistemology over history, that we encounter in Ewald’s critical positivism. In archaeological analysis, by contrast, the whole is already self-sufficient regardless of the need to identify its boundaries by first referring to its parts: that something has ‘serious meaning’ is not an indication of its universal truth but simply of its belonging at a particular point in time to the historical *a priori* in which it is given. Its universality is real for the historical context to which it belongs; but this is of secondary importance to the suggestion that, at any point in time, there “is” serious meaning: that this ontologically distinct level exists, not only by virtue of an archaeological analysis. But that the historical *a priori* might be an intractable function of history; that it might be something more than the creation of a legal science, that it might correspond to a dependable series of discursive modalities that would allow it to perform the function of a ‘law of law’ without suffering the confines of a limited epochal context, depends upon the relationship that we can construe between archaeological ‘history’ and the discrete histories of discursive formations. And whether the historical *a priori* could not only dispel the ahistorical but

²⁶⁵ Nobles, R and Schiff, D *A Sociology of Jurisprudence*, (2006) (Oxford, Hart Publishing), 43.

pre-emptive category of ‘law’ of which ‘social law’ is but a modality, but also diminish the need to speak of a *modality* of law at all – all of this will depend in the last instance upon how the historical *a priori* fares beside the power that invests speech with seriousness and which threatens to rid the “law of law” of its historical contextuality by the pure force of reductivism. For in order to stand up to the critique that is directed towards Ewald’s reflexive law of law, insofar as the latter is said to be both limited in its epochal applicability and too universal in its epistemological range, legal archaeology must ensure that it has guaranteed for itself the obverse: a universally applicable site on which to analyse ‘law,’ and a ‘law of law’ that is epistemologically sensitive to its historical context.

Chapter Three

Law, Power and the Survival of Archaeology

The previous chapter was concerned to prove the conduciveness of the archaeological method to the establishment and examination of a “law object”. As with any positivism that leans close to an epistemological project, however, the task now remains to offer it some protection from the critique from power that will threaten to reduce it to the status of a product of so many power relations. In fact, a dual threat from power emerges: for the archaeological ‘phase’ of Foucault’s work was followed by an ostensible turn *away* from discourses and towards power – a move that threatens to collapse the significance of the whole archaeological enterprise. In light of this dual threat, I will proceed on two fronts. First, I will consider two theses in particular – the first, by Peter Fitzpatrick and Ben Golder, concerning Foucault’s “law”; the second an analysis by Panu Minkkinen of the recurring issue of the “juridical matrix” – in which the element of power in his later work is instrumental either to understanding the nature of a law object or to revealing the fact that law, for Foucault, is perhaps ‘elsewhere’. In analysing these accounts, I suggest that we can find certain nuances therein, especially in Minkkinen’s analysis, some glimmers of hope for a legal archaeology. But first it is incumbent to overcome the overwhelming problem of the ‘law object’, to extract it from the vicissitudes of power.

Therefore, I begin by conducting a fresh analysis of the relationship between power and knowledge, concentrating on Foucault’s early essay on genealogy, *Nietzsche, Genealogy, History*. I show that there is a ‘space’ for knowledge in the power-knowledge nexus that remains untouched by power; and, in a series of problematisations of the relationship of genealogy as ‘counter-history’ to the ‘systems of acceptability’ that inform the practice of power, I hope to show that archaeology remains not only possible, but in fact that it denotes the only way in which these systems of acceptability can be adequately analysed. The manner in which Foucault uses Nietzsche allows, I suggest, for the ‘overhang’ of the element of knowledge in a sense that is irreducible to power. This, I will argue, coincides with the possibility of approaching ‘archaeology’ from an anti-Platonic perspective that gives the “law object” engendered in its systemic positivity a new significance as a ‘counterfeit’ of the ‘ideal’ “law object” germane to epistemologies of law.

Preliminary Matters: The Emergence of Power

If the archaeological method was lacking, perhaps it was because it was being asked to account for too much. For the overarching question informing the entirety Foucault's work was not to provide conditions of possibility (or actuality) of knowledge. True, this question took up the central focus of *The Order of Things* and *The Archaeology of Knowledge*; but it did so only because it appeared (at the time) that this would be the most effective means of answering a prior, and far more crucial, question to which the task of establishing the 'conditions of possibility of knowledge' was merely secondary. Indeed it would be difficult to reduce Foucault's work to an overarching project, but one finds some indication in his discussion of Kant in another context, when he reads *Was ist Aufklärung?* and discerns therein the call to a type of interrogation, "one that simultaneously problematizes man's relation to the present, man's historical mode of being, and the constitution of the self" that is "rooted in the Enlightenment"; and of an ethos "that could be described as a permanent critique of our historical era"²⁶⁶. This project designates a "critical ontology of ourselves as a historico-practical test of the limits that we may go beyond, and thus as work carried out upon ourselves as free beings,"²⁶⁷; but this search for freedom, following the phenomenological 'errors' of the very early work on madness, was not equivalent to an inquiry into lived, fundamental human experience²⁶⁸. Discussing his move to the genealogical method in his work on the prisons (which began very shortly after the archaeological work), he remarks in one interview:

"In order to get a better understanding of what is punished and why, I wanted to ask the question: *how* does one punish? This was the same procedure as I had used when dealing with madness: rather than asking *what*, in a given period, is regarded as sanity or insanity, as mental illness or normal behaviour, I wanted to ask *how* these divisions are operated."²⁶⁹

As with the work on madness, Foucault's studies on punishment are concerned with the *how* over the *what*: to throw off any epistemological commitment to fundamental experiences and to

²⁶⁶ Foucault, M "What Is Enlightenment?"; in Foucault, M and S. Lotringer (ed) *The Politics of Truth*, trans. L. Hochroth and C. Porter (2007) (Los Angeles, Semiotext(e)), at 109.

²⁶⁷ Foucault, "What Is Enlightenment?," 115; See also Hacking, I *Historical Ontology* (2004) (Harvard University Press).

²⁶⁸ Foucault is here in line with what he took to be the general attitude in France at the time "I would say that everything which took place in the sixties arose from a dissatisfaction with the phenomenological theory of the subject, and involved different escapades, subterfuges, breakthroughs, according to whether we use a negative or a positive term, in the direction of linguistics, psychoanalysis, or Nietzsche." ("Critical Theory/Intellectual History" in Kelly, M (ed.) *Critique and Power: Recasting the Foucault/Habermas Debate*, (1994) (Cambridge, Mass., MIT Press), at 115).

²⁶⁹ Foucault, "Questions on Method"; in Gordon, Miller, and Burchell, *The Foucault Effect*, supra. n. 202, 74.

show instead how these experiences are captured institutionally; to suggest that, for the purposes of freedom, all that really matters is this institutional capture, the emergence of forms of “subjectivisation” as opposed to the subjective experiences themselves (which may or may not be actual – the question is no longer of concern to Foucault); and finally, to show these instances of capture in their ‘rarity’. In other words, he is asking on both occasions: ‘*how* is this subject understood as being ‘abnormal’ at a particular point in time?’; and this is opposed to asking ‘*what* was (fundamentally, experientially) abnormal about this subject, and what were the institutional responses to this underlying, immutable experience of abnormality?’

It is this rejection of fundamental experience together with its displacement by institutional positivities that constitutes the link between the archaeology, now in its nadir, and the genealogical method that arises thereafter. And it is in part what causes such difficulty for archaeology, if it is understood, despite every suggestion to the contrary, to be a transcendental method concerning knowledge: for not only must archaeology account for the conditions of possibility of the statements that emerge as positivities; but it must do so in a way that *simultaneously* demonstrates their rarity, if it is to be in the business of accounting for subjectivities that defy any more fundamental grounding in experience. Under such circumstances, the subjectivisation of individuals through institutional discourses would, first, be attributed to the force of some fundamental property of discourse that it was the task of the archaeological method to reveal as having always, inconspicuously, existed on a secondary, *a priori*, basis; but at the same time, the self-evidence of those discourses *must* be thrown into doubt if the investigation is to coincide with the ‘task’ of the Enlightenment²⁷⁰. But if the *a priori* of “knowledge” was the *cause* of our subjectivisation, if an *ineluctable* element of discourse was at the root of every ersatz-experience, then a performative contradiction would inevitably arise in the moment that we have to show that what is produced by this *a priori* element does not share in its universality: that what issued from the *a priori* was always contingent and capable of being disrupted in its self-evidence:

“This leads to a strange and complex attitude: one has to take the world of serious discourse seriously because it is the one we are in, and yet one can’t take it seriously, first because we have arduously divorced ourselves from it, and second because it is not grounded.”²⁷¹

²⁷⁰ The view that Foucault’s project was an “Enlightenment project” has had significant purchase. See generally Ashenden, S and Owen, D (eds) *Foucault Contra Habermas: Recasting the Dialogue between Genealogy and Critical Theory* (1999) (London, SAGE Publications).

²⁷¹ Dreyfus and Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics*, supra. n. 123, at 105.

In other words, a paradox would require to be sustained between the *functional* universality of the secondary rules and the historical contingency *as a matter of fact* of all that they engender. We would be forced both to affirm and to deny the force of exactly the same thing: of this secondary-level a priori that grounds the serious discourses in which we must not believe. It is in stating the foundation of these subjectivities in the element of knowledge, in understanding this foundation as simultaneously constituting the possibility of unveiling contingency that the risk is run. For if we follow Dreyfus and Rabinow in deriving the positive from the fundamental, we find that there is little difference between the ‘formal a priori’ of the Kantian Critique and the historical a priori that Foucault has been trying to distinguish from the former. Once it attains this insidious ‘formality’, what proceeds from an a priori cannot so easily be rejected as false.

Happily, explain Dreyfus and Rabinow, by the advent of the work on the prison, a significant change has taken place for Foucault. If the human sciences are the source of the production of subjectivities, of the treatment by Man of himself as an object of knowledge, the archaeology was a search for a separate level of rules “unknown to the actors involved” in which these sciences found both their conditions of possibility and the source of their untruth; and so “the practices and the practitioners’ theories of the human sciences were subordinated to a theoretical structure which governed them”²⁷². “In Foucault’s later works,” by contrast, this structural ‘unknown’ is supplanted by practice:

“practice, on all levels, is considered more fundamental than theory. Again the intelligibility of the human sciences is not to be found in their own theories. It is not to be found in some system of formation rules either; this level of rules is simply dropped. Nor is it to be found in the horizon of meaning shared by the participants. Rather, Foucault now finds the human sciences intelligible as part of a larger set of organised and organising practices in whose spread the human sciences plays a crucial role.”²⁷³

Explaining his attention to ‘practices’, Foucault explains:

“If I have studied ‘practices’ like those of the sequestration of the insane, or clinical medicine, or the organisation of the empirical sciences, or legal punishment, it was in order to study this interplay between a ‘code’ which rules ways of doing things (how people are to be graded and examined, things and signs classified, individuals trained, etc.) and a production of true discourses which serve to found, justify and provide reasons and principles for these ways of doing things.”²⁷⁴

²⁷² Ibid., 102.

²⁷³ Ibid., 103.

²⁷⁴ Foucault, “Questions on Method,” 79.

Codification and justification, then: or, proper method and legitimacy. Such is the modality of discourse considered as practice. In this period, Foucault turns his attention from the possibilities inherent in knowledge to the problem of power. This is not to say that the level of discourse is discounted entirely: rather, human sciences are now evaluated for their role in entrenching power, in their utility to governance as sites of veridiction and codification: as the knowledge that informs and justifies power. “To put the matter clearly,” Foucault explains: “my problem is to see how men govern (themselves and others) by the production of truth”²⁷⁵. Indeed, ‘truth’ now takes over the role hitherto attributed to secondary rules of accounting for the seriousness of discourses; it is also bracketed, enjoying a quasi-illusory existence, derived, in Nietzschean terms, from power:

“‘Truth’ is to be understood as a system of ordered procedures for the production, regulation, distribution, circulation and operation of statements. ‘Truth’ is linked in a circular relation with systems of power which produce and sustain it, and to effects of power which it induces and which extend it. A ‘régime’ of truth.”²⁷⁶

In turn, then, ‘regimes of truth’ which have their foundation in power establish the principles according to which non-discursive practices persist to create subjectivities – and let us recall that it is not power, but the subject, that is the focus of Foucault’s work – with self-evidence. But this is not all. There is no point at which Foucault explicitly renounces archaeology²⁷⁷. He can simply evade the question over the purported ‘failure’ of archaeology by stating that power has really been the subconscious problem in his analyses to date (“When I think back now, I ask myself what else it was that I was talking about in *Madness and Civilization* or *The Birth of the Clinic*, but power?”)²⁷⁸. This change of focus in Foucault’s method is necessitated, it would seem, by the changing nature of power itself – a change that, given his interest in the subject, now demands his attention.

And so the first publication under these auspices, *Discipline and Punish*, establishes, by examining the history of methods of punishment, a shift over the course of four hundred years from the oppressive violence of sovereign power which maintains order by exercising a right over life and death towards a ‘new’ type of power that corresponds to fragmented, insidious forms of control over bodies. In this work, Foucault depicts in detail the transition from

²⁷⁵ Ibid.

²⁷⁶ Foucault, “Truth and Power”; in Foucault, M (Gordon, C (ed)) *Power/Knowledge: Selected Interviews and Other Writings 1972-1977*, (1980) (Vintage Books, New York)133.

²⁷⁷ For a bibliographical analysis to this effect, see in particular Frauley, J “Towards an Archaeological–Realist Foucauldian Analytics of Government.” *Brit. J. Criminol.* (2007) 47, 617-633

²⁷⁸ Foucault, “Truth and Power,” 117.

punishment in the form of a public spectacle of torture to the emergence of the new, quasi-legal, quasi-scientific figure of ‘the delinquent’. The former belongs to the circuitous relationship between the law of the sovereign and the defence of the order against which the prisoner has offended; the latter to the emergence of the prison apparatus, which “gave to criminal justice a field of objects authenticated by ‘sciences’ [which] enabled it to function on a general horizon of truth”²⁷⁹. In the latter, then, law is no longer oppressive, but informed by sciences (among which we may count modern forms of medicine and the emergent human sciences) which, in turn, attribute a certain sense of self-evidence and necessity to penal institutions and the figures of delinquency which ‘belong’ to them. Power, once exercised as barbarism and informed by divine right, is now informed by sciences and is exercised over the subject in a manner that eschews the spectacle of barbarism but which nevertheless conforms to domination.

In the following year, the first volume of the *History of Sexuality* demonstrated the proliferation in the 18th and 19th centuries of sexuality precisely by discourses and practices – in schools, churches, parental instruction – which aimed at its injunction: “[t]hese sites radiated discourses aimed at sex, intensifying people’s awareness of it as a constant danger, and this in turn created a further incentive to talk about it”²⁸⁰. His thesis is in the spirit of a reversal that was already underway in psychoanalysis of a ‘repressive hypothesis’ in which power associated with law was seen to simply prohibit a pre-existing desire. Other such reversals claimed that the law was already assumed to create the desire in the same moment that it was repressed, and so the constitution of desire went hand in hand with law as censorship or taboo. However, Foucault claimed that such hypotheses took desire as their object, leaving the juridical, prohibitive nature of ‘power’ intact; whereas it was precisely the productive function of power that is in issue in explaining the development of sexuality as an instrument of control:

“In short, it is a question of orienting ourselves to a conception of power which replaces the privilege of the law with the viewpoint of the objective, the privilege of prohibition with the viewpoint of tactical efficacy, the privilege of sovereignty with the analysis of a multiple and mobile field of force relations, wherein far-reaching, but never completely stable, effects of domination are produced. The strategical model, rather than the model based on law.”²⁸¹

To take a final example (this list is by no means exhaustive) in a series of lectures in 1977 under the heading ‘Security, Territory, Population’ Foucault details the gradual extension between the

²⁷⁹ Foucault, M *Discipline and Punish: The Birth of the Prison*, trans. A. Sheridan (1991) (London, Penguin Books), 256.

²⁸⁰ Foucault, M *The History of Sexuality. Vol. 1, The Will to Knowledge*, (1998) (Penguin Books) 31.

²⁸¹ Ibid., 102.

17th and 18th centuries of the ‘art of government’, which formerly pertained to the household in the private sphere, to the public dominion of statecraft, displacing the circuitous ends of sovereign right ‘internal to itself’ with the ‘management of things and processes to perfection’²⁸²; and, finally, to the government of populations in conjunction with the disciplinary governance of individuals.

If this enumeration of the works on power is insufficiently detailed, it is in order to proceed more swiftly to the point (the literature to describing the occasion of these works is vast in any case): in the movement from sovereignty to governance – both as a matter of historical fact and as a question of thinking politically (Foucault chastises political theory in the main for being behind its time on this count²⁸³) – Foucault identifies at work a certain type of power that not only presents an object for analysis in itself, but which can displace the secondary rules of discourse in explaining the production of subjectivities. Had power retained its repressive significance, had it been exercised according to the ‘law which says no’, and had it been in the service of maintaining the completeness of a metaphysical order, the ‘truth’ that informed it (in the form of decrees or prohibitions) would have been capable only of absolute rejection (as reducible to violence) or absolute affirmation. This dichotomy would legislate for a structuralist-Marxist middle ground, of course, in the dimension of ideology. But Foucault is at pains to avoid both structuralism and Marxism. In this new dimension of power, free of the paraphernalia of sovereignty and metaphysics, a linear, derivative relationship proceeds from ‘truth’ to discursive practices: that is, we may proceed from this element of ‘truth’ to the self-evidence of these practices because ‘truth’ can be understood in terms not dissimilar to the Durkheimian concept of ‘social *fact*’:

“Truth is a thing of this world: it is produced only by virtue of multiple forms of constraint. And it induces regular effects of power. Each society has its regime of truth, its ‘general politics’ of truth: that is, the types of discourse which it accepts and makes function as true”²⁸⁴

Thus it would appear that this turn to the element of power achieves what the rules of discursive formations in the *Archaeology* could not: it attests to the force of the discursive practices that constitute subjectivities, and simultaneously to their arbitrariness, in the fact that the ‘truth’ that

²⁸² Foucault, “Governmentality”; in Foucault, M (Faubion, J.D. (ed)) *Power, The Essential Works of Foucault 1954-1984 Vol. 3*, (2002) (Penguin Books), 211.

²⁸³ cf Foucault, M (Senellart, M (ed)) *Security, Territory, Population: Lectures at the Collège de France 1977-1978* trans. G. Burchell (2009) (Palgrave Macmillan).

²⁸⁴ Foucault, “Truth and Power,” 131.

both justifies and informs them is the product of ‘multiple forms of constraint’. In a footnote, Dreyfus and Rabinow comment on the loss of formal rules following the failure of archaeology:

“Foucault is now interested in the use made of the norms, rules, and systems which, in *The Order of Things*, he already sees as definitive of the human sciences. Such concern is poles apart from Foucault’s earlier attempt to find rules which would further “a general formalisation of thought and knowledge” ... Formal rules are precisely what Foucault does not preserve in his new combination of archaeology and genealogy”²⁸⁵

The turn away from formalising rules must render any connection between Foucault and legal positivism, for which I attempted to argue in the previous chapter, impossible: law is now to be assessed for its utility in informing practices of subjectivisation, and it therefore defies an objective “autonomy”. The law retreats into its hitherto status as a self-defining, dubious but nevertheless active human science among others. That is not to say that this normalising function of law does not intersect with sovereign violence (precisely this matter is at the heart of Agamben’s work): but we might think of this as the reduction of law to one form of power instead of another. Disciplinary practices may likewise exhibit ‘juridical’ or ‘infra-legal’ features, but nevertheless they, like the discursive practice that refers to itself as ‘law’ and is bound up with the State are discourses the ‘truth’ of which is a social fact entrenched in the circulation of power (I shall examine this in detail below). The very element of law in any Foucaultian analysis must surely, then, diminish under the weight of the genealogical method and the turn to power?

The impact of these findings on law is, of course, of no concern to Dreyfus and Rabinow; nor ought it to be of any concern to those who use Foucault’s studies on his own terms and for the same purposes since, for them, grounding the conditions of discourse on a plane of rules entailed, in the last instance, the invocation of an “unthought” horizon from which the archaeologist could not, seemingly, extract himself; Foucault’s method had, hitherto, capitulated to the very anthropocentrism it was trying to demolish. This “unthought” was the last word in archaeologically grounding serious discourses – to assume that there is an horizon from what to draw those rules is to suggest that there is something ‘present’ behind them which can be brought to light by the activity of inquiry. This ‘presence’ denotes the presupposition of ‘origins’ – the Husserlian ‘metaphysics of presence’ to which Derrida opposed deconstruction and on the basis of which he directed his critique of Foucault’s early archaeology. If Foucault no longer sought out the lived experience of the subject, the later archaeology nevertheless

²⁸⁵ Dreyfus and Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics*, 108, at note 1.

continues to risk this same ‘metaphysics of presence’ by referring back in the last instance to the unthought. I have argued above to the contrary; nevertheless it seems that in order to avoid the charge of ‘presence’ one must ‘bracket’ the legitimacy of statements. If one cannot do this by grounding them in a perpetually repeatable ‘system’ and therefore the “unthought” in the form of positivism, the only alternative, it would appear, is to explain those conditions in the context of the ‘power’ that produces them, that enforces their legitimacy. However, the connection between power and the ‘emergence’ of meaning, which we may understand as synonymous with ‘legitimacy’ or ‘seriousness’, is not straightforward or unmediated – a simple reduction of ‘acceptability’ to the play of power is not to be assumed. For the notion of a ‘field’ is still retained, Dreyfus and Rabinow suggest, in which practices operate. It is as if one ‘space’ in which ‘acceptability’ functions has been replaced by another:

“There are many lessons to be drawn from this radical shift of perspective. The first is that “no one is responsible for an emergence; no one can glory in it, since it always occurs in the interstice”... For the genealogist, there is no subject, either individual or collective, moving history. This notion comes as no surprise. But the notion of interstice is surprising. The play of forces in any particular historical situation is made possible by the space which defines them. It is this field or clearing which is primary. As we saw, in *The Archaeology of Knowledge* Foucault already had this notion of space or clearing in which subjects and objects occur. But then he thought of the space as governed by a system of rules which emerge discontinuously and without any further intelligibility. Now, this field or clearing is understood as the result of long term practices and as the field in which those practices operate.”²⁸⁶

I will examine this ‘interstice’ in more detail below. For Dreyfus and Rabinow, it serves the purpose of displacing the positivity of the discursive formation which, I suggested, was synonymous with the historical *a priori*, and which designated the discrete historical space in which rules of formation could operate. Where one interprets ‘historical *a priori*’ differently, the advent of genealogy, power and non-discursive practices will give these latter elements priority in the explanation of methods of subjectivisation. The ‘interstice’ in question, considered to be a ‘field of practices,’ specifically ‘long term practices’ – is now the basis on which the continuity of the relationship between subjects and objects occurs. With theory relegated to a secondary position and the prioritisation of practices and genealogy over discourse and archaeology, any pauses or changes in the history of the ‘acceptability’ of discursive practices is intelligible only on the basis of non-discursive practices that deploy them and the play of dominations that establish them.

²⁸⁶ Ibid., 109.

Law stands, therefore, to be *doubly* the casualty of any failure of the archaeological method. If it is synonymous with the exercise of sovereign power, it has been eradicated as a matter of fact²⁸⁷; but if it is a discursive practice placed in an homogenous unity alongside every other, further problems emerge. Must we treat it seriously, for example, or bracket its status as ‘law’ to its own self-description, as is the case in sociologies of law? Can Foucault’s method lead to an autonomous theory of law or must it be brought within the context of another legal discipline, which is to say, sociology? In arguing for a ‘legal archaeology’ I am not joining the ranks of those who seek out a version of “Foucault’s law,” at least insofar as the attempts to do so seem to attempt to divine Foucault’s attitude towards law, or to extrapolate from his work some sort of continuity of the treatment of law that has its own significance. I am arguing for a ‘legal archaeology’ so that it might become a general method for the study of law, regardless of whether Foucault intended it to be so (he certainly did not). Nevertheless, there are two studies dedicated to the task of discerning both of these things – Foucault’s *proper* law on one hand, and an undercurrent of ‘law’ in Foucault’s theory on the other – which are decisive in treating the question of the relationship of power, discourses and non-discursive practices in a legal context, the insights of which can, I think, further the project of arguing for a legal archaeology – which one cannot but place in the context of the genealogical method that accompanies it.

Law, Power, Transgression

The suggestion that law can be understood as “complete, coherent and fully present to itself”²⁸⁸ has been cited as a fundamental understanding of Foucault’s law, one that allows it to fall prey to the ‘expulsion thesis’ that relegates it to a minor or supplementary role in the exercise of modern governmental power. Ben Golder and Peter Fitzpatrick argue that Foucault’s law defies a determinate ‘form’ such as that which is given to it by the ‘expulsion’ thesis. The latter is the socio-legal argument led by Alan Hunt and Gary Wickham that assumes, first, that Foucault “casts law in the role of a pre-modern harbinger of absolutism”²⁸⁹; and subsequently that contrary to trends in twentieth century thought that cast the question of law as one of the central questions of modernity, Foucault’s description of the shift from sovereign to disciplinary forms of power has the effect of ‘expelling’ the law. Against this expulsion, Hunt and Wickham argue that ‘law’ – in the sense of a social practice – has been instrumental to this secondary form of

²⁸⁷ See generally Hunt, A and Wickham, G *Foucault and Law: Towards a Sociology of Law as Governance* (1994) (Pluto Press).

²⁸⁸ Golder, B and Fitzpatrick, P *Foucault’s Law* (2009) (Routledge), 61.

²⁸⁹ Hunt and Wickham, *Foucault and Law*, 59.

power; citing examples ranging from the use of criminal law and anti-trade union laws in the production of labour discipline²⁹⁰ to the use of law in ‘normalisation’ and welfare provision (an endorsement of Ewald’s thesis, discussed in the previous Chapter) and in providing for ‘procedural’ constitutionalism (siding epistemologically, albeit not politically, with Hart as well as Habermas). This approach to Foucault’s law is problematic in two senses for Golder and Fitzpatrick. First, this understanding of Foucault’s law is too reductive – there is more to his understanding of law than absolute or repressive sovereign power. Secondly, the law which we *can* find in Foucault does not *merely* reside next to disciplinary power in a formation according to which the latter enjoys priority. It stands instead in a reciprocal relationship to this form of power: straddling the human sciences that cannot properly inform the operation of disciplinary power, and which, in the absence of the requisite force, cannot on their own ensure normality; and lending justification to the exercise of that power: “legally supervising the peripheries of power”²⁹¹.

It is in the nature of power not only that it should restrain, but that it should also resist: the human sciences cannot cope with the resistant power that always refuses to abide by the norm, and therefore the law is necessary to capture the recalcitrant part of the social that resists reduction to norms, that resists power. This, one might think, suggests that there is a social function irreducible to power or knowledge, but which persists alongside both, that is captured by the epithet ‘law’, even if the latter is not to be understood as possessing a determinate ‘essence’ or existence. Golder and Fitzpatrick address this by positing two “dimensions” of the law – the first resides on the side of the norm, the establishment of the boundaries of the normal, boundaries which cannot but be resisted and transgressed; while the second face of the law is responsive to this resistance and transgression. Thus Golder and Fitzpatrick speak of “a law of mutability, which is constantly in excess of its determinate self”. The negative presentation of ‘law’ by proponents of the expulsion thesis, as a repressive form of power operating alongside disciplinary power, is therefore only one half of the story – for, in its responsiveness, law is also changeable, adaptable to the instances of recalcitrant power that exceeds it. Golder and Fitzpatrick explain this function of the law by bringing it into line with the idea of the ‘limit’ that emerges in some of Foucault’s earlier work. In *Preface to Transgression*, Foucault had explained that

²⁹⁰ Ibid., 64.

²⁹¹ Golder and Fitzpatrick, *Foucault’s Law*, 64–65.

“the limit and transgression depend on each other for whatever density of being they possess: a limit could not exist if it were absolutely uncrossable and, reciprocally, transgression would be pointless if it merely crossed a limit composed of illusion and shadows”²⁹²;

but the act of transgression can never be completed or exhausted – its only function is to ‘affirm limited being’; and the limit can only draw itself for the purposes of its own transgression, to the effect that

“Transgression... is not related to the limit as black to white, the prohibited to the lawful, the outside to the inside... Rather, their relationship takes the form of a spiral which no simple infraction can exhaust”²⁹³.

In other words, limit and transgression are always inextricably bound and mutually generative. “As with power and the limit,” claim the authors, “so too... with law”²⁹⁴: the law in its dual dimensions operates not singularly alongside discursive power, but in tandem with power. Thus, they tell us, the law cannot remain ‘tied to any content’ but must ‘incorporatively engage with what is other to it’.

To this effect, Foucault’s law engages, they claim, with “exteriority” – by which they mean, it would appear, not quite the “outside” – since in its intractable relationship with the limit, transgression can never properly proceed to the “outside” into which it is always poised to leap – but a form of outside conjoined to an “interior”. In this context the authors are referring to a number of statements about law in the work of Blanchot – with whom Foucault engages, and in the context of whom he does discuss the ‘law’. But all the same, the position they put forward is certainly Blanchot’s, but not necessarily Foucault’s, law: and it is in any case to overlook the entirety of the presentation of the “law” in Foucault’s discussion of Blanchot. One moment in particular stands out, in which Foucault states the law as follows:

“The law is the shadow toward which every gesture necessarily advances; it is the shadow of the advancing gesture”²⁹⁵

²⁹² Foucault, M “A Preface to Transgression”; in Foucault, M (Bouchard, D.F. (ed)) *Language Counter-Memory Practice: Selected Essays and Interviews*, trans. D. Bouchard and S. Simon (1977) (New York, Cornell University Press), 34.

²⁹³ Foucault, “A Preface to Transgression,” 35.

²⁹⁴ Golder and Fitzpatrick, *Foucault’s Law*, 77.

²⁹⁵ Foucault, *Maurice Blanchot*, 35.

The ‘shadow’ (cast by the gesture) *toward which* the gesture, futurally, ‘advances’. Once again we find the trace of the grammatical form, the future anterior – caught up in the *singular figure* of the shadow. If there is ever a statement anywhere in Foucault’s work that gives a determinate definition of the law, this is it. But it is not picked up upon so much as Blanchot’s own commentary.

If the law has no solidity, coherence or presence for Golder and Fitzpatrick, surely it is nevertheless not possible to deny it some form of ontology? Law *is* determinate and law *is* responsive – what, we might wonder, is the nature of this being that law apparently ‘is’? If it is not reducible to power, not to a negative form of power, certainly, but neither to the circulating modality of power, working instead for and against the latter, informing discipline and opposing recalcitrance while taking the latter into itself, but always standing *in relation* to power, and in excess of it, then can we say that it has a materiality? In fact, speaking alone, Fitzpatrick claims that it does, in a sense, enjoy an ‘incorporeal materiality’, insofar as it ‘manifest[s] itself by delimiting and marking out the content of the inside in its relation to the outside.... In so doing, exteriority invests and constantly refounds the inside by drawing in the force of the outside, thence rendering the inside as an ‘interiorization’ of the outside and endowing it with such a range of receptivity that it becomes ‘completely co-present’ with the outside”²⁹⁶.

In other words, the law – if we are to ‘locate’ it anywhere – occupies this position of ‘exteriority’. Fitzpatrick explains that while ‘transgression’, as we have seen above ‘affirms limited being’, there is another ‘mode of effecting the outside’, which ‘operates somewhat apart from it – Foucault’s ‘relations’ or ‘field of exteriority’. Citing the *Archaeology*, he explains that “[t]hese are relations ‘established between’ a collection of ‘institutions, economic and social processes, behavioural patterns, systems of norms, techniques, types of classification, modes of characterisation’”. Surely this field is one with the historical *a priori* that I am attempting to assimilate to ‘law’? But instead of concentrating on any systematisation of these relations, Fitzpatrick adds a new layer to what this ‘exteriority’ might mean:

“Exteriority, then, is the mediate matter in-between the outside and this collection inside. As such, exteriority *channels the illimitable ‘force’ or ‘forces’ of the outside* not only into the making and varying of the specific ‘forms’ assumed by these entities in the collection, but also into those ‘transformative and transforming ‘combinations’ of the entities that go to make up the specific forms.”²⁹⁷

²⁹⁶ Fitzpatrick, P “Foucault’s Other Law”; in Golder, B (ed) *Re-Reading Foucault: On Law, Power and Rights*, (2013) (Abingdon, Routledge) 52.

²⁹⁷ Fitzpatrick, “Foucault’s Other Law,” 52.

‘Exteriority’, then, assumes both an ‘impalpable substance’ and also an activity: exteriority ‘conjoins’, ‘effects’, ‘merges’. The effect of this active, impalpable ‘exteriority’ is to mediate the ‘abject’ and ‘positivist’ law of the inside – which we might understand as the ‘determinate’ aspect of the law – as it ‘escapes’ from the positivist, abject, or sovereign context and into the heart of normalising power as ‘infra-law’, the judgement of the doctor or psychiatrist and so on. It is here that normalising judgements are met by – and necessitated by – recalcitrance: ‘Not only is the factual, even ‘scientific’ assertion of normality powerless in the face of recalcitrance, but the recalcitrance... *constitutes the norm*’²⁹⁸. Here we find a repetition, this time in the opposition of ‘judgement’ and ‘recalcitrance’ – an expression of the tension between the factual and prescriptive context of the ‘norm’ – of the opposition between limit and transgression, or law and – what we may take, in the whole edifice of ‘normalising power and its recalcitrance’ to be ‘the social’, and in which this ‘recalcitrance’ stands in for the ‘outside’ that the law must contain as norm and which must yet reject the notion of norm as ‘fact’ alone. The ‘inside’ seems to relate to the determinate ‘Idea’ of law that sociology replicates: and so exteriority, in all its activity, is precisely the ‘matter’ that rules as it mediates limitlessness and limit. To this effect, Fitzpatrick now cites the notion of Foucaultian ‘exteriority’ as it appears, not for Blanchot, but for Deleuze:

“exteriority invests and constantly refounds the inside by drawing in the force of the outside, thence rendering the inside as an ‘interiorisation’ of the outside and endowing it with such a range of receptivity that it becomes ‘completely co-present’ with the outside.”²⁹⁹

In short, the purpose of the law is determined in Golder and Fitzpatrick by its location; and its nature is determined by the *description* of this location. The arbitrary assimilation between the ‘exterior’ in Blanchot and ‘exteriority’ in Deleuze is crucial to this description. It is also not one that can be sustained – particularly not in Deleuze’s ‘Foucaultian’ sense. First, in Deleuze’s treatise on Foucault, the ‘inside’ and the outside ‘outside’ do correspond to an ‘exterior’ that resides in a relationship of relativity between the two. But these spatial elements have a very specific sense, as three modes of *being* particular to thought. The inside refers to the self-being, the outside to power, and the exterior to the pure being of ‘knowledge’, distributed across the quasi-phenomena of light and language respectively – two forms of knowledge that meet each other ‘as in combat’. In his use of ‘exteriority’, Deleuze is faithful to Foucault’s archaeology, and ‘exteriority’ has a very specific meaning: it is the circumvention of phenomenological ‘intentionality’ (in which one mentally ‘behaves’ in a certain way towards an object already in the world, in order to bring it to consciousness). “This,” says Deleuze, “is Foucault’s achievement”:

²⁹⁸ Ibid., 54–55.

²⁹⁹ Ibid., 52 note 13 (citing Deleuze, *G Foucault*, (2006) (London, Continuum) 81 and 97).

“the conversion of phenomenology into epistemology. For seeing and speaking means knowing [*savoir*], but we do not see what we speak about, nor do we speak about what we see; and when we see a pipe we shall always say (in one way or another): ‘this is not a pipe’, as though intentionality denied itself, and collapsed into itself. Everything is knowledge, and this is the first reason why there is no ‘savage experience’: there is nothing beneath or prior to knowledge. But knowledge is irreducibly double, since it involves speaking and seeing, language and light, which is the reason why there is no intentionality”³⁰⁰

Exteriority is knowledge wrested from the Husserlian scheme of transcendental consciousness: it denotes another way of encountering in thought the range of visibilities and modes of speech among which we find ourselves in the moment of thinking. It is a form of positivity; it is wholly unassimilable to any form of ‘activity’, mental or otherwise, its entire purpose being to eliminate the activity of ‘intentionality’ in the first place.

The relations ‘established between’ the elements described are precisely that: ‘established’, that merging of the adjective and past participle. That is to say, these relations are not presently active ‘rules’ but also ‘regularities’ – the last Chapter was dedicated to discussing the methodological utility of these ‘relations’, for they were intended, in the *Archaeology*, to constitute the historical *a priori* of knowledge; in the shift of analysis to ‘non-discursive’ practices described above, they are said to have preceded the apparent filling in of that *a priori* by the causality of power. And this causality effects these perceptible ‘regularities’ between elements – they do not have effective power in themselves, and even if they did, their product of this effectiveness would be *knowledge itself*. Exteriority does not *effect* anything; nor does it *respond* to anything. The methodological strictures of genealogy and archaeology – opposed but nowhere conflated – disbar the concretisation of ‘exteriority’ as a force or an activity; it only admits of a level of perceptibility of certain, carefully defined, phenomena. It is a field upon which these phenomena *emerge*. But the relationships between them defy any notion of ‘causation’: in fact, they are themselves the product of the confrontation of forces of power. Hence they are *established* – already, having a prior cause. We always find the relationships of exteriority like this: historically, not in the process of their formation. As we shall see, if we discern the perpetuity of such an ‘activity’ in Foucault’s work, especially in his understanding of law, we must give to it a different, un-Foucaultian name. We must understand it as a legal trope of suppression of the will and the pushing forward of desire.

It is not obvious that Fitzpatrick intends the whole triad to correspond to Deleuze’s own. But it is shown here that some effort is being made to understand ‘exteriority’ in particular in Foucaultian terms. There appear to be two opposed uses of the word. The first – in the aspect of

³⁰⁰ Deleuze, *Foucault*, 90.

knowledge; the second in the aspect of the “outside”. And these two aspects – perhaps this is the point, perhaps it should be stated more forcefully – might respectively constitute an exteriority-of-the-inside (knowledge, the Deleuzian and archaeological ‘exteriority’); and an exteriority-of-the-outside (in Blanchot’s sense, or the sense of a ‘transgressive’ exteriority). This argument is not specifically made, but it is, I think, a viable interpretation of Fitzpatrick’s position. However, neither form of ‘exteriority’ can be said to survive Fitzpatrick’s description of the latter *as law*, if we are to understand law as both delimited and responsive, in respect of a wider social sphere that it renders possible and which also exceeds it.

Now, Fitzpatrick knows this. He concedes in a footnote that he is citing Deleuze but ‘not his sense’³⁰¹. So Fitzpatrick’s treatment of Deleuze, of this interior-exterior-outside triad, is wholly metaphorical. What of the other use of ‘exteriority’ – Blanchot’s use? We might consider this more easily synonymous with the ‘outside’, understood by Fitzpatrick (and Golder) as the transgressive realm beyond the ‘limit’, the recalcitrance beyond the ‘interior’ determinate part of the law.

“Along with its ‘going ever farther into the outside; there is ‘the silent and infinitely accommodating welcome of the law’ in which law *becomes of* ‘the outside that envelops conduct, thereby removing it from all interiority’.”³⁰²

If law proceeds into the ‘outside’ as the aspect of its responsiveness, and also ‘*becomes of*’ this outside, then this configuration might lend some consistency to the idea that it is illimitable, and yet that it is not without limit: the law can still ‘go further into the outside’ from where it presently resides, and yet take the content of that outside as its own in a way that would solidify the latter into something more concrete, determinate. Except that this is not what Foucault says. At the risk of pedantry: the quote is thus: “the law *is* the outside that envelops conduct’ – not that it *becomes of* this ‘outside’. The distinction is crucial: this ‘outside’ cannot be understood (while my pedantry reigns) as *effecting* the law. Rather, it can only be read as precisely the law, synonymous with the law itself.

We have a problem, in this case. First, we lose the ‘link’ to the outside in the form of the activity of exteriority. Exteriority is the world of light and language which, in Derrida’s reading of the *Phaedrus*, is also the world of the *hypomnēsis* and the archive, of dust and the echo – not the activity itself. Thus no charge of ‘merging’, ‘mediating’ or the like can be made for it. This exteriority is acted *upon*. It is always determined. This does not bode well for an understanding of

³⁰¹ Fitzpatrick, “Foucault’s Other Law,” note 12.

³⁰² Ibid., 53 citing Blanchot, emphasis mine.

law as generatively ‘responsive’ – only a passive responsiveness would remain. At least insofar as we understand that law as ‘exteriority’ in the sense of ‘knowledge’. Secondly, we cannot appeal to its affectedness by the outside, in the sense of its ‘becoming’ of the outside – rather, if we are to take the Blanchot-definition of ‘exteriority’, we must concede that the law *is* the outside.

And so, obliquely disregarding the nuance with which Deleuze speaks of ‘exteriority’, Golder and Fitzpatrick argue that law has no ‘perduring and determinate content’, that it is afflicted by a ‘constituent emptiness’: what the authors refer to as law’s “polyvalent vacuity”³⁰³. In its interminable responsiveness to the very power of recalcitrance that it itself prompts, by confronting that power with ‘limits’, to exceed it, the law is assumed not to have a ‘form’, and following from this, a history.

“Lacking a form of its own, having in fact a ‘total lack of content’, law also lacks a history. Indeed, as Derrida observes, it ‘seems to exclude all historicity’: “It seems that the law as such should never give rise to any story. To be invested with its categorical authority, the law must be without history, genesis, or any possible derivation. That would be the *law of the law*.””³⁰⁴

Again, however, this is avowedly *Derrida’s* understanding of law, not Foucault’s. But secondly, while it might sit easily with deconstruction, for whom one must perpetually move behind the text, following each internal cleavage into the abyss where there is no presence or origin; while the authors claim that “Foucault consistently observes law’s vacuity,” that “[f]rom the ‘gaps’ and ‘silences’ of the law to its ‘empty’ areas, law frequently appears (or, perhaps, dis-appears) in his writings as an ‘impalpable substance’, as a present ‘absence’.”³⁰⁵ - there is nevertheless a significant difference between saying that the law is void of determinate content, that it has gaps and silences, and to suggest that it has no ontology, let alone no history.

Law and Desire

If Fitzpatrick’s use of Deleuze seems somewhat laboured, it is perhaps because Deleuze appears to have situated the law, as Panu Minkkinen explains, in the domain of knowledge alone in a way that might suggest it has a determinate form as one ‘discursive practice’ among others. With the advantage of this added clarity, Minkkinen can undertake his own study of the Foucaultian understanding of law with more caution. From the outset, he is suspicious of Deleuze’s

³⁰³ Golder and Fitzpatrick, *Foucault’s Law*, 83.

³⁰⁴ Ibid. citing Derrida.

³⁰⁵ Ibid. citing Foucault on Blanchot.

reduction of law to the sphere of knowledge, for, as he points out, it is not acceptable in Foucault's general discourse to assume the presence of a 'superstructure' over above social practices. Thus, "If law is to be situated within the domain of knowledge as Deleuze suggests, its relation to power remains enigmatic"³⁰⁶; and, given the scope of Foucault's work that stretches not only over the history of knowledge but into the domain of social practices, the question of power must be assumed to be of the essence especially in the question of 'Foucault's law'.

Instead, Minkkinen situates the question of law within Foucault's post-archaeological phase in which he undertook to describe the 'will to know'; for it is in the midst of these lectures that Foucault spoke explicitly in terms of 'juridical forms'. Thus he undertakes to recast the question, renaming the object that we are looking for, in the process³⁰⁷. It is no longer the function or presence of a determinate 'object' of law in Foucault's work that concerns us; but rather, a certain 'juridical logic', a law-like motif irreducible to any determinate object. Again, Minkkinen makes use of Deleuze's exteriority, but this time with specific attention to the twofold form that this exteriority takes. For Deleuze, knowledge is comprised of two dimensions: of light and language, the latter pertaining to the level of discourses, discursive practices, statements. Light, on the other hand, concerns the 'visibilities' encountered non-discursively in practices which present objects to knowledge, allowing them to be apprehended by discourse but not reduced by the latter. Insofar as Deleuze is situating 'law' in the domain of knowledge, he situates it on one side of that domain – in the side of the 'discursive', as 'penal law' is opposed to the non-discursive practices, concerning the 'visibilities' of knowledge, of the 'prison'. Law can't feasibly be held in that domain any longer; or at least, insofar as critical legal thinking is engaged with Foucault, we should shift our analysis not to this discursive form of 'law', but to the question of the 'juridical, "a modus of power-knowledge indexed to a distinct logic, entailing both discursive and non-discursive elements"³⁰⁸. The relationship between these discursive and non-discursive practices is 'disjunctive': "The practices have no common form, but on the border they confront each other as enemies on a battlefield"³⁰⁹. For Deleuze, truth is obtained by virtue of two procedural games: social/non-discursive practices that pose questions about the visibility of things and their ordering; and discursive practices which organise words and utterances. Minkkinen relates that, in Deleuze's summation, "for Foucault, knowledge can make truth appear only through problematisations within the procedures of discursive and non-discursive

³⁰⁶ Minkkinen, "The Juridical Matrix"; in Minkkinen, *Thinking Without Desire: A First Philosophy of Law*, (1999) (Oxford, Hart) 105.

³⁰⁷ Minkkinen opposes the treatment of law as a determinate 'object' – as we saw in the previous chapter, his criticism of Ewald concerns the use of an ahistorical concept of 'law'

³⁰⁸ Minkkinen, "The Juridical Matrix," 110.

³⁰⁹ Ibid., 109.

practices”³¹⁰. It is possible, he thinks, to extend our understanding of law to cover both (and not just one) of these dimensions, insofar as we understand Foucault’s law as punctuated by a series of ‘juridical matrices’.

This figure of the ‘juridical matrix’ is inferred from certain elements of Foucault’s work in the early 1970s, directly following the *Archaeology*. Using the example given in *Discipline and Punish* of the relationship between discursive practices such as penal law and the human sciences on one hand, and the formative non-discursive practices that inform the latter, such as the prison, Minkinen explains, in Deleuzian language: “As a discursive practice, penal law comprises both language as a condition and the utterances it makes possible, just as the prison, in its non-discursive nature, encompasses light and what it enables to be seen. Truth is produced in the disjunctive relation of the respective procedures, that is, the processes and the methods.”³¹¹ In a series of lectures given on the *Will to Know* in the first few years of that decade, we encounter the most explicit formulation of that logic. Minkinen turns his attention specifically to a set of lectures on what Foucault will call “Oedipal knowledge” that are organised under the heading “*Truth and Juridical Forms*”. In these lectures, a series of epochally dominant social practices for the discovery of ‘truth’ are delineated – the trial, measurement and the investigation. An epochal matrix is a “structural reduction”³¹² of those social practices – both discursive and non-discursive – that ‘disjunctively’ confront each other in order to produce truth. “The matrices uniting social practices account for the formative effect of the non-discursive *vis a vis* the discursive,” and “the epochal periodisation of Foucault’s history can be structured as a succession of matrices derived from, for the most part, juridical practices”³¹³ which have been delineated throughout those lectures on *Truth and Juridical Forms*. In each, practices are established according to which ‘visibilities’ are produced by social practices in such a way that make them relevant to particular discourses, and discourse in turn takes the elements of its ‘language’ emanating under the influence of these non-discursive practices and sends these back into the world of social practice in the form of ‘speech’.

These matrices for the production of ‘truth’, in which light and language, discursive and non-discursive practices, are enabled to confront one another, are far wider than the singular discursive practice of law; and they exceed any one juridical form – wider than the trial, the measure or the investigation. Instead the characterisation of law as the ‘juridical matrix’ serves to denote that there is a commonality of purpose and form to these separate combinations of

³¹⁰ Ibid.

³¹¹ Ibid.

³¹² Ibid., 111.

³¹³ Ibid.

practices, each belonging to a determinate epoch: each corresponding, that is, to the acceptable practices for determining truth and performing the relay between discursive and non-discursive practices at a particular point in time.

Emphatically, then, Minkkinen explains that ‘law is not a practice’, but the ‘matrix’ – the structural modality – in which discursive and non-discursive practices relate to each other at a particular point in time; the virtual “form” that can be derived from the regularities discernible between a series of practices. The only means of discovering these matrices, however, would appear to entail an observation of their incidence and regularity to the extent that they characterise the process of procuring truth in a determinate era. For example, if the ‘investigation’ *constitutes* the juridical matrix for a particular point in time, it is because we have identified that ‘truth’ was to be ascertained according to a certain modality of practices which prevailed in that epoch: for example, the practice of finding testimony to verify sequences of past events was the only acceptable way of arriving at truth, the Kingly knowledge of Oedipus having been banished (seemingly contemporaneously with the writing of the tragedy) from history. The ‘law of halves’ found in the Oedipus story is characteristic, then, of the juridical matrix that corresponds to the ‘investigation’³¹⁴.

Secondly, what must these ‘matrices’ denote if not the discursive and non-discursive prerequisites for the procurement of ‘truth’ specific to an age – that is to say, the historically contingent discursive and non-discursive *rules* for the formation of acceptable statements and visibilities that count towards the production of ‘truth’. Is this not reflective of, albeit perhaps not on the face of it reducible to (in the case of ‘visibilities’), the rules of formation that characterise the historical *a priori*? The production of truth does not, however, entail the element of ‘knowledge’ alone. While situating law within an analysis of power alone would necessitate that one renders determinate the form or object of the law for the purposes of that analysis, nevertheless Minkkinen suggests that for each matrix a specific form of ‘power’ is involved. With the investigation, for example, Minkkinen suggests that there exists a corresponding form of juridical power. The invocation of ‘power’ at every point in the examination of matrices is of crucial importance for Foucault’s project of demythologising truth and its forms of procurement:

“Ever since Oedipus, power has been understood as blind and ignorant while the task of philosophers has been to search for, on the one hand, the eternal truths of the gods and, on the other, the testimony of the people in whose memory the traces of truth are still sustained. This is the antinomy of power and

³¹⁴ It is noteworthy that Fitzpatrick also engages the same ‘law of halves’ from the *Oedipus* tragedy, not to designate a *particular* modality of law, but as the attribute common to all law – its very nature insofar as it is both determinate and responsive and therefore, throughout history, always in the form of an inquisition - yet *without resolution*).

knowledge: power is blind while knowledge either faces the light of the gods ahead or turns retrospectively back to the history of the people. The aim of Foucault's Nietzschean power analytics is to destroy this myth."³¹⁵

It is precisely because power can be shown to coincide with these juridical practices for discerning 'truth', in the form of power-knowledge and therefore as an adumbration of the 'apparatus' that will inform the remainder of Foucault's work, that this truth is left vulnerable to critique. In considering the matrices of practices for discerning the truth, then, it appears necessary that we establish them only in light of their relationship to power, lest we run the risk of mythologizing the truth engendered therein as Truth proper. And indeed, with Deleuze, power intersects with the strata of visibilities and utterances, providing the force by virtue of which they come into conflict. The matrices in which the practices of truth-finding are determined are thus ineluctably linked by a 'relay' that joins them together : one which moves, we might assume (as a 'relay' implies that there is a dynamic) under the rubric of 'power'.

"As matrices, law conveys the visible to the domain of language in a way that is both formative and bellicose. Through the procedural methods working within the matrical framework, social practices instruct and direct... the discursive domain of knowledge just as the master attends to the training and schooling... of his apprentice. But at the same time, it must necessarily also involve the strategic element of war because the formative relation between the discursive and the non-discursive is disjunctive."³¹⁶

In this 'disjunctive' element, the dynamism of law emerges: Golder and Fitzpatrick unsurprisingly find this idea appealing, too – but they attempt to capture it for Foucault himself, whereas Minkinen problematises its ubiquity in a different way, as we shall see. A certain dialectic emerges in the 'disjunctive' relationship between practices: "[i]n delivering the social to the discursive, law as disjunction accounts for the paradox of simultaneous order and conflict"³¹⁷. But the dynamic of the juridical 'matrix' ought to be distinguished from Golder and Fitzpatrick's understanding of 'Foucault's law' in an important respect.

Golder and Fitzpatrick situate the law in the midst of power: it is 'responsive' and 'determinate' – its passive characteristics are described, it is given status as a determinate object that remains unchanged but facilitative of change, in the form of the limit the relationship of

³¹⁵ Minkinen, "The Juridical Matrix," 116.

³¹⁶ Ibid., 117.

³¹⁷ Ibid.

which to transgression is intractable. Law has a curious kind of ‘object-ness’ that runs the course of the history of power, it forms a central point around which power circulates and through which power is mediated. Minkkinen’s description is slightly different: for it analyses this putative ‘object’ in greater detail. We are not concerned with its *passive* characteristics in the dimension of power, but with its own internal *activity*, its own dynamic form. In describing this, Minkkinen gives to the law not a consistent ‘object-ness’ of the type that would be necessary to coincide as a functional invariable with an analysis of power; but rather an abstract ‘matrical’ structure the modality of which can be shown to change from one epoch to the next. It is not a constant element recurring through a history of power; rather, it is a polymorphous formation in its own right: it is capable, in principle, of possessing its own history. Foucault did not extend, Minkkinen laments, his study on juridical forms to an extent that would have engendered such a history – but it would, he concedes, have been feasible.

So while a history of power subordinates ‘law’ to a determinate object that is significant in light of its function – in Golder and Fitzpatrick, for its social function – within that history; an understanding of law as ‘juridical matrix’, while denying law an essential modality and suggesting that it is capable of several such modalities, allows a history of this law to be written. It is Minkkinen’s point, given the wider scope of his thesis (of which this is an illustrative part), to demonstrate that throughout its varying modalities, the juridical matrix is always characterised by desire – that it is the relay through which the social world presents itself to language and orders itself through speech. In the last instance, law, for all that we may write a history of its varying modalities, becomes both the prohibition that engenders desire and, as we saw in Chapter One, the ‘civilising function’ that in Minkkinen’s words “engages (Man) into the conflictive universe of contradicting desires”³¹⁸. However, is this not in the last instance to reduce law to desire altogether? To ensure that at all times law is ‘articulated upon something other than itself’, as Golder and Fitzpatrick would have it? And, if so, is this not to suggest that the history of law cannot necessarily be ‘written’ as the history of so many modalities, but that law, in a Hegelian manner (and Minkkinen does draw a comparison here with Hegel), *is* ‘history’? That it is stretched dialectically from conflict through desire and finally, one day, perhaps, to Truth?

In other words, does this last movement which prioritises the ‘disjunctive’ conflict carried out within ‘matrices’ over their historically contingent, structural reductions, not stifle the potential for analysis produced by the very act of *noticing* that such reductions are possible? It seems too profound an insight to lie waste. If we do not make use of it, must we concede that there is not a differing series of modalities of ‘law’, but one law, bound up with desire, that

³¹⁸ Ibid., 118.

develops throughout the course of history without, for that reason, changing its form? The irreducible distinction would appear to be that between the understanding of law as a determinate object running through the course of a history of power; or as a structural abstraction that takes on different modalities but which, despite the differences between them, nevertheless are to be understood in the context of a singular and total history of conflict and prohibition? We do not, in this instance, simply capitulate to the aspect of 'desire' that Foucault tried to eradicate from law and from his work; we also relinquish the attitude towards history that he had so carefully cultivated in order to free it from totality.

Must we, in order to do justice to Foucault's historical project, concede with Golder and Fitzpatrick that law takes on a determinate ontology that runs through the course of a history that is not its own history, but a history of power that it mediates but cannot reduce to itself? It appears that too much is at stake if we are to ignore Minkkinen's insistence on the irreducibility of law to a determinate form. And there is, consequently, much to be gained by giving due attention to his suggestion that a history may be conducted of the changing regularities of discovering 'truth' – that the law as a 'juridical matrix' may have a history of its own. But in order to avoid the collapse of this history into a total history, it must be possible to distance the law from conflict and desire. It would be necessary, that is, to detach the study of law once and for all from the study of power, and to sever the history of law in its varying epochal modalities from the history of conflict.

It is far from obvious that we are insisting that knowledge is 'blind to power' in doing so: for, as I shall presently argue, with Foucault we may avail ourselves of *several* histories, precisely in the interests of distancing ourselves from 'truth' and necessary forms of thought and conduct. If law is to be found in the matrix of discursive and non-discursive practices, a matrix that determines the rules according to which utterances and visibilities may come into 'formative and bellicose' contact – it is imperative that we decide at the outset whether to analyse that matrix in terms of the rules that it establishes for the conduct of that contact, or the conflict and repression that will be waged within the boundaries of those rules, whatever their nature.

If, however, and *contra* Minkkinen, we use his own insight into these matrical regularities to analyse the changing modalities of these rules themselves, it may be possible to conduct a history not *of* law, but *for* law – one that does not insist on its own totality, but which does not reduce the law to a determinate 'object' either. We encounter in archaeology a form of history capable of apprehending groups of rules for the formation of discourses (which we must, with Deleuze, extend to the field of visibilities) as discrete 'positivities', treating them as a type of object that is nevertheless not quite the same thing as that 'determinate' object of the law put into use by

Ewald. Any such objectivity would, with Fitzpatrick, afford to the law a ‘quasi-incorporeal materiality’; but against Fitzpatrick, this would be a history of changing forms of that materiality, the history of groups of formation rules described as positivities, a history of law that does not simply designate its contrapuntal significance in the midst of another history, a history of power that is not its own history.

Archaeology with Genealogy

Having shown the concerns over archaeology surrounding the shift in Foucault’s thinking between the archaeological and genealogical ‘phases’ and the relationship of that shift to the various efforts to think, contain, expand or ‘expel’ something like “law” in or from Foucault’s work, I will now attempt to add a series of inversions, distinctions and elaborations of my own. First I will attempt to reaffirm the space in which archaeology ‘remains’ in the face of Foucault’s turn to the genealogical method. Reading an early essay on Nietzsche, I will attempt to show that Foucault’s concession that power and struggle are entailed in the production of ‘meaning’ or legitimacy nevertheless does not entail a displacement of the ‘system of rules’ by the ‘interstice’ in which struggles are waged, as Dreyfus and Rabinow suggest. I will then proceed to raise a series of questions that problematise the relationship between what I suspect is a remnant archaeological ‘level’ and the fluctuation of power in Foucault’s thought. It is only once we have established the permanency of this level and its complete irreducibility to ‘power’ that we must again re-consider the need to describe this level, and to perform its history, by other means. But the problem of a ‘determinate law object’ remains. Extending the previous discussions of Deleuze and reading his analysis of Foucault alongside Foucault’s own Nietzschean investigations, I propose that a certain ‘Sophism’ underlies Foucault’s work, that could deliver a new understanding of these ‘systems of rules’ and the level on which they emerge. I suggest that the anti-Platonism of Deleuze is also capable of being shared by Foucault, and that the systemic nature of the archaeology can be encountered by the Sophist attitude, that sees the systematisation of rules of formation, of the “Law of law”, as the imposition of a series of differences – a counterfeiting of the “law object” that opens up a new avenue for critique.

Remnants of the Archive in the turn to Genealogy

In a piece entitled *Nietzsche, Genealogy, History*, Foucault gives a description and interpretation of Nietzsche's particular form of history from which he will derive his own genealogical method thereafter. If "[t]he origin lies at a place of inevitable loss, the point where the truth of things corresponded to truthful discourse... that discourse has obscured and finally lost," genealogy, the "new cruelty of history," "compels a reversal of this relationship.... Behind the always recent, avaricious and measured truth, it posits the ancient proliferation of errors"³¹⁹. Its point is to show the *pudenda origo* behind morality, the 'artifice' that grounds religion: in short its aim is to deny, in line with the post-anthropocentric critique of metaphysics discussed in the previous chapter, that there is any 'primordial truth' in accordance with which we might objectively establish the origin of things; an origin that 'precedes the Fall' and which we must attempt to recover. Instead, there is 'something altogether different' behind every historical beginning: and this something different has its form not in the loftiness of a divine or primordial truth, but in lowliness, in resentment and petty conflicts: the figure of origins is not the divine but the 'monkey [which] stands at the entrance'.

Genealogy thus disbands the search for any such origins and takes instead as its object the unmasking of lowly beginnings behind every accepted 'truth'. It counters the purported purity and objectivity of traditional history with a history that 'dispel[s] chimeras of the origin'³²⁰. Foucault notes that there are two simultaneous aspects to this new history, which he calls "effective history", insofar as it will "uproot [the] traditional foundations [of the self] and relentlessly disrupt its pretended continuity,"³²¹ which we can derive from two words that Nietzsche uses in place of the term '*Ursprung*': the first is '*Herkunft*', which is more akin to 'descent'; the second '*Entstehung*' or 'emergence'. The first, *Herkunft*, departs from traditional forms of history insofar as it "doesn't try to restore an unbroken continuity," nor does it "demonstrate that the past actively exists in and animates the present"; rather, it "maintains passing events in their proper dispersion; identifies errors, faulty calculations that gave birth to the things that exist and continue to have value for us"³²². Therefore in countering the traditional historical understanding of a continuous string of events that led to the moment in question, *Herkunft* allows us to uncover the self-evidence of the series of events that give rise to historical facts: to show these events in their error and non-necessity, describing them not from the privilege of our own historical position but without 'piety'³²³.

³¹⁹ Foucault, "Nietzsche, Genealogy, History"; in Foucault, *Language Counter-Memory Practice*, supra. n. 292, at 143.

³²⁰ Foucault, "Nietzsche, Genealogy, History," 144.

³²¹ Ibid., 154.

³²² Ibid., 146.

³²³ Ibid.

The theme of ‘emergence’ corresponds to ‘descent’ in that, just “as it is wrong to search for descent in an uninterrupted continuity, we should avoid thinking of emergence as a final form of historical development”³²⁴. If descent dispels the necessity of the course of events that lead us to the point of a beginning, emergence disrupts the meaning given to the fact of that beginning. Its function is to reduce the “anticipatory power of meaning” whereby we accept the significance we give to things today to the “hazardous play of dominations”: the significance of things is an expression of their satisfaction of a particular set of needs established through domination and made self-evident through the continuous play of struggles, a play that transpires upon a peculiar topography:

“As descent qualifies the strength or weakness of its instinct and its inscription on a body, emergence designates a place of confrontation but not as a closed field offering the spectacle of a struggle among equals. Rather, as Nietzsche demonstrates in his analysis of good and evil, it is a “non-place,” a pure distance, which indicates that the adversaries do not belong to a common space. Consequently, no one is responsible for an emergence; no one can glory in it, since it always occurs in the interstice.”³²⁵

For Dreyfus and Rabinow, let us recall, this interstice is understood as a space which makes *possible* “the play of forces in any particular historical situation”; and in a way that replaces, in Foucault’s own thought, the space “governed by a system of rules which emerge discontinuously and without any further intelligibility” – in short, the conditions that were seen to dictate the production of statements in so many rules of formation have been neatly supplanted by a “field” upon which “long term practices...operate”³²⁶. In their view, then, the genealogical identification of a non-place, a strange topology, of ‘struggle’ has taken over the role previously accorded to ‘systems of rules’ for the purposes of undermining the self-evidence of statements. But let us conduct here a preliminary examination of the space as it appears in *Nietzsche, Genealogy, History*.

In their ‘emergence’, the needs posited by dominant forces in battle as self-evident and meaningful remain as such for as long as they are maintained alongside that struggle. “In a sense,” explains Foucault, “only a single drama is ever staged in this ‘non-place,’ the endlessly repeated play of domination”³²⁷. There is an important distinction, of course, to be made between an endless domination and something like a dialectic in which negation and antithesis will propel the progression of meaning. Indeed, Foucault seems to envision a lesser arrangement than that compulsion and negation that we find in Hegel: “Humanity does not gradually progress

³²⁴ Ibid., 148.

³²⁵ Ibid., 150.

³²⁶ Dreyfus and Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics*, supra. n. 123, at 109.

³²⁷ Foucault, “Nietzsche, Genealogy, History,” 150.

from combat to combat until it arrives at universal reciprocity, where the rule of law finally replaces warfare;” however, there is, in this interminable play of domination something that denotes its intelligibility: quite contrary to what Dreyfus and Rabinow have just proclaimed, in the essay we are told that “humanity installs each of its violences in a *system of rules* and thus proceeds from domination to domination.”³²⁸

“The nature of these rules allows violence to be inflicted on violence and the resurgence of new forces that are sufficiently strong to dominate those in power. Rules are empty in themselves, violent and unfinalized; they are impersonal and can be bent to any purpose. The successes of history belong to those who are capable of seizing these rules, to replace those who had used them, to disguise themselves so as to pervert them, invert their meaning, and redirect them against those who had initially imposed them; controlling this complex mechanism, they will make it function so as to overcome the rulers through their own rules.”³²⁹

For a new modality of investigation that purportedly reduces everything, now, to the play of forces, we might wonder at the inclusion of such ‘empty rules’, apparently epistemological objects, the existence of which is without immediate explanation, alongside the ‘practices’ to which Dreyfus and Rabinow accord priority. Furthermore, we find that domination can extend itself and stave off its disruption by becoming

“fixed throughout history – in rituals, in meticulous procedures that impose rights and obligations...”³³⁰.

I want to dwell a little on this fragment, since it reveals an idea of ‘fixity’ which is very rarely touched upon in secondary literature on Foucault’s genealogy. In its moments of fixity – the duration of which, let us note, is unspecified – domination “establishes marks of its power and engraves memories on things and even within bodies”³³¹. In other words, because there is at play in this space something more vulgar, less mystical, than dialectics, each victorious ‘domination’ in this non-space of struggle corresponds, in its fixity, to something exterior – as opposed to the dawning of a ‘truth’ or a ‘history of ourselves’ that will rush in with the dawn of an inevitably victorious counter-history.

It is here, I would suggest, that we find the first ‘break’ that distinguishes the history of statements from the history of struggles over meaning: while genealogy guarantees nothing but

³²⁸ Ibid., 151.

³²⁹ Ibid.

³³⁰ Ibid., 150.

³³¹ Ibid.

the destruction of origins, the media on which those origins are maintained are positioned at some distance from the arena of struggle, insofar as they are capable of taking the form of ‘engraving’ or ‘memory’ or ‘ritual’; as if this form was capable of removing them from the level of struggle and containing them in a new reality. More evidence for this position can be found in a 1971 *Lecture on Nietzsche*, in which Foucault explains that, although “[t]he world is essentially a world of relations which are unknowable in themselves”³³², “a group of [these relations] is characterised by the fact that they forcibly join together several differences, that they exert violence so as to impose on them the analogy of a resemblance, of a common unity or affiliation, which marks them with a common stamp”³³³. This ‘common stamp’ or ‘mark’ is significant insofar as it in turn “allow[s] a utilization or a domination, or rather of extending the first level utilisation or domination. The mark is the multiplier of the relation. It refers therefore to a will to power”³³⁴ – it *allows* domination, it *extends* the first-level domination. It is therefore to be understood in the Derridean sense, as ‘supplement’. Secondly, it “allow[s] recurrence, repetition, the identity of successive differences – the identification of first level differences. The mark is the identifier of the relation. It refers to a reality”³³⁵: in the repetition and recurrence of differences we encounter ‘a reality’ that is not the unknowable world of relations, but *something more*. And finally, although “we can say that this will is the necessary foundation of this reality,” Foucault suggests that “we can say... that this will is a will to power (i.e., more than action and reaction...) *only* because there are marks which constitute things, which posit their reality”³³⁶. In this way, domination acquires a ‘form’ in which it is fixed: a substrate that bears the ‘marks’ which ‘posit the reality’ of things. Something close, that is, to an *archive*.

Whether the Function of Counter-Memory Destroys the Archive

If the genealogical method is directed towards the malicious destruction of origins, it must surely also follow that it destroys the memory of those origins. Unlike traditional history, genealogy makes no claim to stand outside of history itself, needing no platform of its own, content to progress in an unceasing destructiveness. Thus, against every victorious history that has attained the ‘fixity’ of memory – against what we now suspect is each time an *archive* without which no dominant interpretation (and history itself) can persist in its victory – genealogy conducts “a use

³³² Foucault, M “Lecture on Nietzsche”; in Foucault, *Lectures on the Will to Know*, op. cit. supra. n. 182, 211.

³³³ Foucault, “Lecture on Nietzsche,” 211.

³³⁴ Ibid.

³³⁵ Ibid.

³³⁶ Ibid. emphasis mine.

of history that severs its connection to memory, its metaphysical and anthropological model, and constructs a counter-memory – a transformation of history into a totally different form of time³³⁷. What is the nature of this ‘counter-memory’? Is it another ‘memory,’ established by the genealogist, and formed on the substrate like any other event? It would appear not to do so, for the will to know, in its malice, resists any such dialectical movement. Can it be said, then, to destroy every memory? This would certainly be in line with Heidegger’s understanding of genealogy as ‘destruction’. But this would be at odds, apparently, with an important distinction between Foucault and Nietzsche. Like Dreyfus and Rabinow³³⁸, I do not intend to undertake a complete analysis of those differences: instead I will place some degree of trust in a point made in John Simons’ insightful monograph on Foucault’s “politics” to the effect that, for Foucault, unlike for Nietzsche, genealogy is not *destructive*:

“Foucault does not share Nietzsche’s despair of political action under contemporary conditions, in part because he holds that efforts to reinterpret oneself must resist networks of power/knowledge that constitute subjects.”³³⁹

That is to say, Foucault resists the nihilism of Nietzschean genealogy, since his own adaptation of the latter does not entail an annihilation of positions on which to speak.

This sentiment is reinforced in the lecture on Nietzsche, in which Foucault would consider the task of “think[ing] the history of truth without relying on truth;” and following Nietzsche, ostensibly, suggest that we might seek out such a history “In an element where truth does not exist: this element is appearance”³⁴⁰. Nietzsche understood knowledge not as engendered by a ‘will to know’, in the sense in which Aristotle would posit it: the attitude, that is, of the one who desires knowledge *vis a vis* the apparent, metaphysically coefficient “fact” of knowledge that pre-exists him. Against this idea, Nietzsche held that knowledge did not lie in wait for an attentive will to truth to discover it, but was engendered instead out of a will to power. As a consequence, not only would every ‘knowledge’ be reducible to something ‘altogether different’ – to malice, wickedness and sometimes need – but ‘truth’ could never be anything other than ‘violence done to knowledge’, an ‘illusion’ or an ‘error’. There would be no possible ‘ontology’ of truth: “in the predicative judgement: truth *is* true, the verb to be (sic) has

³³⁷ Foucault, “Nietzsche, Genealogy, History,” 160.

³³⁸ Dreyfus and Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics*. The authors “plead neutrality concerning the textual accuracy of Foucault’s reading... Nietzsche interpretation, a flourishing industry in France in recent years, is a field of danger and strife which we leave to others, more fully armed; our concern is with Foucault.”, at 106

³³⁹ Simons, J *Foucault and the Political*, (1995) (London, Routledge) 21.

³⁴⁰ Foucault, “Lecture on Nietzsche,” 217.

the ontological meaning: truth exists” and so, given that “truth is violence done to things”, and that in this light “truth is destruction of the illusion of knowing,” Nietzsche’s formation allows the conclusion that “if this destruction is developed against knowledge and as destruction of knowledge itself, then truth is a lie”³⁴¹.

But this does not render all ontology of ‘truth’ *of a sort* impossible. Foucault aims in the course of these lectures to interrupt the dominant (Heideggerian) interpretation of Nietzsche that assimilates ‘will to truth’ directly with ‘will to power’ which encompassed, seemingly, every form of knowledge³⁴². Against this, Foucault identifies something in excess of this reduction – a “will to know...Which has been neglected in favour of an analysis of the will to power”³⁴³. Daniel Defert, when writing the Course Context that supplements the published collection of these lectures, refers to the continuity of this “will to know” that is not reducible to the “will to power” or the “will to truth” and therefore destructible in the incendiary meeting of the two:

“Knowledge (*savoir*) surrounds science and does not disappear when a science is constituted. A science is inscribed and functions in the element of knowledge. The territory of knowledge enabled Foucault to describe “epistemes” without having to resort to those divisions of true and false, science and ideology.”³⁴⁴

Insofar as it operates within a context in which knowledge-*savoir* and therefore Foucault’s own understanding of the ‘will to know’ engenders an *overhanging* “knowledge” in respect of the mutual cancellation in most Nietzschean thought of ‘truth’ and ‘power’, genealogy is charged with a far lesser task than, for instance, Derrida’s deconstruction. It seeks out the ‘moment of arising’ not of ‘truth’ in order to destroy it or to replace it with a new meaning, but of knowledge-*savoir* in order to explain it.

The opposition of knowledge-*savoir* and the ‘truth’ of origins exposed to destruction can also be identified in the distinction made in Foucault’s inaugural lecture at the Collège de France, entitled *Orders of Discourse*, between ‘truth’ and ‘being in the true’. Here, Foucault contemplates the difficulty of establishing the *errors* of a scientific discourse, “for error can only emerge and be identified within a well-defined process”³⁴⁵. Here, Foucault is contemplating that it would only be possible to distinguish the ‘true’ from the ‘false’ from a position already inside a particular

³⁴¹ Ibid., 216–17.

³⁴² See Defert, D “Course Context”, in Foucault, *Lectures on the Will to Know*, op. cit. supra. n182, at 267.

³⁴³ Letter dated 16 July 1967 produced in the French collection of Foucault’s writings titled *Dits et Ecrits*, reproduced and cited in Defert, D (ibid.), at 266.

³⁴⁴ Ibid.

³⁴⁵ Foucault, M “Orders of Discourse: Inaugural Lecture delivered at the Collège de France,” *Soc. Sci. inform.* 10 (2) (1971) 7-30, 17.

discourse; and likewise that it would be (howsoever this might be imagined – perhaps, as Beatrice Han suggests, from the vantage point of a more enlightened time?³⁴⁶) possible to speak the truth in general without being ‘in the true’ at the time of pronouncement:

“It is always possible one could speak the truth in a void; one would only be in the true, however, if one obeyed the rules of some discursive “policy” which would have to be reactivated every time one spoke”³⁴⁷

These positions of truth that are not *dans le vrai* are described as “monstrous” discourses, speaking within it, speaking to it, but not fulfilling the “onerous and complex conditions before it can be admitted within a discipline”³⁴⁸. And yet in Nietzschean genealogy, the category of error *without truth*, rather than any possible opposition of truth and error, reigns supreme since all ‘truth’ is procured as a matter of violence and all knowledge is illusory. The maintenance of a category of ‘being in the true’ in which truth and error may operate on their own level of significance is perhaps frustrating for philosophers³⁴⁹; but it is promising for lawyers, or at least for legal positivists who are not committed, quite yet, to ‘justice’. It suggests once again that this ‘being in the truth’, ignoble though it might be in comparison to the ethics and justice of deconstruction, is nevertheless possessed of resources that remain untapped for their legal significance.

Let us proceed for now in that pre-1971 language that treats knowledge-*savoir* as ‘being in the true’, precisely to denote that there is a space in which ‘truth’ and ‘error’ *of a sort*, divisions *of a sort*, can be meted out in light of the curious ontology of a kind of ‘truth’, a form of positivity in which it is possible to speak of a ‘*being in-the-true*’ without destroying that ontology: allowing it, that is, to overhang, to exceed, the violence and struggle, the ignominy of its birth. For archaeology was not yet disbanded at the time of the inaugural lecture³⁵⁰, and the genealogy of *Nietzsche, Genealogy, History* in the following year is therefore unlikely to have been intended for its destruction. This enables one to draw a series of distinctions between Foucault’s genealogy and deconstruction in particular, first, since genealogy moves backwards through the ignoble history of things that it does not take seriously but nevertheless allows to exist; while deconstruction progresses nobly forward in time through the text that it takes seriously, if only to refute the

³⁴⁶ See Han-Pile, B “Is Early Foucault a Historian?: History, History and the Analytic of Finitude.” *Philosophy & Social Criticism* Vol. 31 nos 5-6 (2005) pp 585-608 (at 599 in particular).

³⁴⁷ Foucault, “Orders of Discourse,” 17.

³⁴⁸ *Ibid.*, 16.

³⁴⁹ For Han, for example, who maintains that this distinction cannot serve Foucault’s ‘critical project’ (cf Han, *Foucault’s Critical Project*, op. cit. supra. n215, 91.

³⁵⁰ Dreyfus and Rabinow concede this much. Dreyfus and Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics*, 105.

content of that seriousness by engaging interminably with the text. But it also allows us to show that the Foucault's genealogy as 'counter-memory' was never a wholly destructive enterprise: but rather, only one of two histories that were intended to support and complement one another. So long as there is need for rationality, even that with which we conduct history, there will exist this element of knowledge.

Drawing the Limit Between Counter-Memory and Struggle

In considering the relationship between genealogy and other struggles, let us recall that the practice of counter-memory proceeds alongside the memory that it disrupts, without destroying the same. This parallel operation will proceed insofar as there has been no return, no destruction of that memory which retains forms and rules corresponding to one interpretation on the level of everyday struggle. This is not to say that there will not eventually arise an instant in which the dominated finally use the force (those 'empty rules') of the dominant interpretation to destroy it: but this eventuality, unlike that which we encounter in radical, dialectical laudations of the force of 'contradictions', is simply without warranty from the position of counter-memory. In order not to fall into the process of struggle that it seeks to describe, we have seen that domination must be buoyed up with the suspension of itself on marks, rituals and memory. Counter-memory must, therefore, seize *first* upon a "substrate," to use Derridean language: only then can it begin to make intelligible the origin of dominant meaning as an 'emergence' and thus discover its descent from accident and error.

And because the success of a dominant interpretation will persist for as long as the 'interstice', the stage upon which all emergence is played out, has been covered over by the façade *engraving, marking, ritual, memory*: let us therefore say that the limit between genealogy and quotidian struggle is characterised by the relationship of the former to the 'stillness' of memory that follows the event. That is the first thing: there is a "limit" dividing quotidian struggle and counter-memory, and is to be found in the *stillness* of the struggle over truth, in the dust of the archive that preserves the law and protects its official history. Again, then, and in Derridean language: counter-memory corresponds to the conserving power of the law, but it has no equivalent for the founding power of violence - that is to say, it does not enjoin the struggle over 'meaning'.

Secondly, and on a related note, the limit is characterised by the distinction between "meaning" and "intelligibility":

“History has no ‘meaning,’ though this is not to say that it is absurd or incoherent. On the contrary, it is intelligible and should be susceptible of analysis down to the smallest detail – but this in accordance with the intelligibility of struggles, of strategies and tactics”³⁵¹

Genealogy, in recounting the descent of all that is self-evident, renders *intelligible* the accidents, errors, and struggles it encounters; but it does not impose an antithetical meaning of its own upon them. It is in this opposition of the genealogist’s search for intelligibility to the historian’s search for meaning that the distance from dialectics, for example, can be grounded – allowing genealogy to counter the progression of history towards “Truth”. But in the absence of any guarantee of contradiction, it follows that genealogy must find its own methodological (that is to say, practical) space, too³⁵². Detached from the struggle over meaning, genealogy is only ever *possible* on the basis of the interpretive force of the event: insofar as it is not an interpretive practice itself, but rather the method whereby all interpretations can be reduced to the instances of their emergence and descent, genealogy must find its opportunity between, or above, the historic play of power and interpretation. The final characterisation of the limit, then: it is not the *event* itself, for the latter pertains to the level of struggles. Rather, the limit that divides genealogy from the struggles of which it conducts a history inheres in the time, however brief, *after the event* in which ‘emergence’ occurs and is evidenced by being marked into the substrate, in which the genealogist may situate his practice.

This avoidance of ‘meaning,’ however, has been problematically situated beside Foucault’s wider understanding of ‘power’. In an article published near the end of Foucault’s life and therefore within reach of most of his published work, Charles Taylor critiques Foucault’s insistence that “the idea of liberating truth is a profound illusion” and that “there is no escape from power into freedom”, that “we can only step from one [regime] to another”³⁵³. He accords this dual denial to Foucault’s “Nietzschean-derived stance of neutrality between the different historical systems of power”³⁵⁴, which leads him to repudiate the “goods” that Taylor nevertheless finds in these analyses, insofar as “some notion of liberation seems to peek

³⁵¹ Foucault, “Truth and Power,” op. cit. supra. n. 276, at 114.

³⁵² In a piece that rather uncritically accepts, with Dreyfus and Rabinow, that archaeology is ‘over’ and supplanted by the genealogical method, David Garland nevertheless recognises that genealogy cannot get underway without a particular ‘starting point’. However, in the absence of archaeology, and without attention to the function of ‘ritual’ or the ‘empty rules’ of the Nietzsche essay, we are invited simply to take a critical attitude towards our present – something that would be difficult, I fear, to extrapolate from the history of struggle itself for the reasons I have outlined in this section. See Garland, D “What Is A ‘history of the Present’? On Foucault’s Genealogies and Their Critical Preconditions.” *Punishment & Society* (2014) Vol. 16(4) 365-384

³⁵³ Taylor, C “Foucault on Freedom and Truth”; in Couzens Hoy, D (ed) *Foucault: A Critical Reader*, (1986) (Oxford, Basil Blackwell), 70.

³⁵⁴ Taylor, “Foucault on Freedom and Truth,” 79.

through”³⁵⁵. Taylor speaks of a ‘disconcertion’ when reading Foucault that arises from the fact that, while he insists upon maintaining that neutrality of value, most forms of power are presented in the negative; *against* liberation and *against* truth – and are thus pejorative. For example, Foucault, he claims, “reads the rise of humanitarianism exclusively in terms of the new technologies of control. The development of the new ethics of life is given no independent significance”³⁵⁶. This misses the point, suggests Taylor, that “collective disciplines can function in both ways, as structures of domination, and as bases for equal collective action”³⁵⁷; that his focus upon modes of subjugation “leaves out everything in Western history which has been animated by civic humanism or analogous movements”³⁵⁸. Therefore, he asks “can there really be an analysis which uses the notion of power, and which leaves no place for freedom, or truth?”³⁵⁹

Such a view would radically oppose the value-neutrality of a Nietzschean thesis opposed to meaning. Nevertheless, Taylor insists that the very nature of power – albeit that Foucault dissociates it from its simplification into strategies of ‘repression’, instead understanding it not as a thing that we possess, but something that circulates – implies some sense of meaning, some indication of ‘freedom’ and ‘restraint’. Quite happily, then, he suggests that the “Nietzschean programme on this level does not make sense,” because “the notion of power or domination requires some notion of constraint imposed on someone by a process in some way related to human agency. Otherwise the term loses all meaning.”³⁶⁰ In other words, it appears that Foucault’s concern to attune his analyses to Nietzschean ‘neutrality’ must give way to his concern for the study of power. Under a Nietzschean framework, “there is no order of human life, or way we are, or human nature, that one can appeal to in order to judge or evaluate between ways of life. There are only different orders imposed by men on primal chaos, following their will-to-power.”³⁶¹ And so, as we know, the imposition of a set of rules or justifications behind practices, a set of principles that inform the conduct of life or the exercise of power, will be the product of a struggle; and we must encounter, through counter-memory, those meanings in light of their existence as *products of power*. As such there is no ‘common measure’ against which we may compare one truth regime against another, one set of practices as more desirable or emancipatory than another – for both will be conducted under the aegis of a set of norms that derive from the interplay of struggle. Thus, explains Taylor, “[t]his regime-relativity of truth means that we cannot raise the banner of truth against our own regime. There can be no such

³⁵⁵ Ibid., 81.

³⁵⁶ Ibid.

³⁵⁷ Ibid., 82.

³⁵⁸ Ibid., 83.

³⁵⁹ Ibid., 90.

³⁶⁰ Ibid.

³⁶¹ Ibid., 93.

thing as a truth independent of its regime, unless it be that of another.”³⁶² The “relativism” of truth-values as the product of power also instates the “monolithism” of our own regime: we are unable to understand ‘truth’ outside the context of the regime of power-knowledge that establishes the same.

It follows from this that, despite the fact that all ‘power’ entails a degree of repression, and therefore an inkling of what it might mean to be liberated from that repression, the Nietzschean disavowal of ‘meaning’ and ‘truth’ renders quite senseless any attempt to distinguish between types of power, between repression and liberation, for the purposes of change or evaluation. But given the nature of ‘circuitous’ power, this value-neutrality, for Taylor, is itself nonsensical: “[b]ecause [power] is linked with the notion of the imposition on our significant desires/purposes, it cannot be separated from the notion of some relative lifting of this restraint, from an unimpeded fulfilment of these desires/purposes.”³⁶³ And so in the dimension of power there is always the possibility of identifying what it means to be liberated, what it means to operate towards freedom – and this is the discovery of a kind of ‘truth’. “Biographically,” explains Taylor, “we see examples all the time. After a long period of stress and confusion, I come to see that I really love A, or I really don’t want to take that job.” We can, he claims, evaluate these things ‘retrospectively’³⁶⁴; and what is more, he argues, something comparable prevails throughout politics and history: “[t]here are changes which turn on, which are justified by, what we have become as a society, a civilisation”³⁶⁵. The way in which these justifications might emerge are similarly the projection of retrospective self-awareness:

“Questions of truth and freedom can arise for us in the transformations we undergo or project. In short, we have a *history*. We live in time that is not just self-enclosed in the present, but essentially related to a past which has helped define our identity, and a future which puts it again into question”³⁶⁶

What is being suggested, then, is that the ‘regime relativity’ that Foucault espouses in the dimension of power-knowledge is unsalvageable in its vulnerability to collective and individual histories. This has tremendous resonance with the formulation of law’s ‘responsiveness,’ suggested by Golder and Fitzpatrick above: maintaining that the latter-Foucaultian treatises on the “Care of the Self” entail more than simply “a question of personal or private behaviour,” they designate the ethics of care involved in the last phase of Foucault’s work as conducive of a

³⁶² Ibid., 94.

³⁶³ Ibid., 91.

³⁶⁴ Ibid., 96.

³⁶⁵ Ibid.

³⁶⁶ Ibid., 98.

social form of “ethics,” for example in the grouping together of ethical positions in gay rights activism: “Foucault is providing a constituent model of *sociality*, of being-together, in which the transformation and displacement of ‘one’s’ subjectivity takes place in a relational and contestatory field of affects, encounters and engagements with others”³⁶⁷. It is this constituent power which engages the law in its responsive dimension: and it is thus connected to an ethics first of the self, but secondly of groups sharing commonalities – again, *against* a monolithic idea of ‘being in the true’.

Must we concede, then, the practice of counter-memory, bound as it is to the monolithic and relative ‘truths’ of a particular regime, must give way to more traditional forms of history, in which we re-connect with ‘ideas’ about truth and freedom and use these to adjudge, with some degree of confidence, our relative positions within the circulation of power? Must we elect, that is, between the study of power in the way that Foucault presents it to us and his Nietzschean instructions? Should Foucaultians consider themselves as restoring ‘origins’, even if it is a deferred type of ‘origin’ in the sense set out by Golder and Fitzpatrick, of ‘becoming’? After all, Foucault’s ‘Enlightenment project’ engages us in the task of ‘thinking and being otherwise’³⁶⁸, and it is far from certain that this ‘otherwise’ does not invoke the fresh espousal of a set of ‘truths’ or ‘ideas’, a set of standards that correspond, more or less, to resistance-as-freedom. But we must not mistake this latter form of reflexivity with the idea that a universal subject, capable of speaking the ‘truth’ about itself, unbidden, has re-emerged on the scene for Foucault in those later works: even then, the question for Foucault was not that subjects could *not* speak about themselves, but “*at what price* can subjects speak the truth about themselves?”³⁶⁹. In a late interview, he maintains the position he began in the *Archaeology* and which intensified during his turn towards Nietzsche:

“...I in no way construct a theory of Power. But I wish to know how the reflexivity of the subject and the discourse of truth are linked – “How can the subject tell the truth about itself?” – and I think that relations of power exerting themselves upon one another constitute one of the determining elements in this relation I am trying to analyse. This is clear, for example, in the first case I examined, that of madness. It was indeed through a certain mode of domination exercised by certain people upon certain other people, that the subject could undertake to tell the truth about its madness, presented in the form of the other.”³⁷⁰

³⁶⁷ Golder and Fitzpatrick, *Foucault’s Law*, supra. n. 288, 121.

³⁶⁸ Foucault, “What Is Enlightenment?” op. cit. supra. n. 266

³⁶⁹ Foucault, “Critical Theory/Intellectual History (Interview),” in Kelly, M op. cit. supra n. 268, at 120 my emphasis.

³⁷⁰ Ibid., 128–29.

One must not forget, then, that insofar as we speak the truth of ourselves or the truth of our liberation, we do so from a subject position that is always-already constituted by relations of power. That the conditions of speaking, ‘liberating’ as they might be in the form of the talking cure, are always articulated from the point of view of an Otherness that did not exist, a subjectivity that was not in being, before modalities of power seized upon the life of these individuals. And so in this sense, this ‘monolithic’ and ‘relative’ form of regime-specific knowledge is immutable. And is not counter-memory intended, in any case, to be just such a history of ourselves?

Nevertheless, Taylor’s discussion of ‘regime-relativity’ does, I think, point to the necessity of another history, given the correctly-adduced monolithic nature of counter-memory in Taylor’s essay and its non-consonance with ‘struggle’; but this other history is not in the form of any such ‘history of ourselves’ from the position of the ‘true’ subject, the master of his own memory and experience. And yet it is necessary for the very reasons that Taylor sets out above, namely that: “[t]here can be no such thing as a truth independent of its regime, *unless it be that of another*”³⁷¹. It is the virtue of the archaeological method that it places these independent and relative truths side by side in the form of the ‘archive’, in the special sense in which it appears in the *Archaeology*:

“Far from being that which unifies everything that has been said in the great confused murmur of a discourse, far from being only that which ensures that we exist in the midst of preserved discourse, [the archive] is that which differentiates discourses in their multiple existence and specifies them in their own duration.”³⁷²

It is in this archival element that monolithic and relative forms can have a replete history of their very succession. How this can also have a character as a history of freedom shall be suggested in more detail below. But certainly it is worthy of note that the archaeology, a history of successive archives, engages in another form of “being otherwise” that does not exact the price of speaking as Other (as one speaks the ‘truth’ of one’s madness):

³⁷¹ Taylor, “Foucault on Freedom and Truth,” 94.

³⁷² Foucault, *Archaeology of Knowledge*, 146.

“In this sense, the diagnosis does not establish the fact of our identity by the play of distinctions. It establishes that we are difference, that our reason is the difference of discourses, our history the difference of times, our selves the difference of masks”³⁷³

Outside of Struggle and Memory: Whence Counter-Memory?

Let us recall the localities that we have already encountered in the course of these chapters from which one may speak about a total history: from the subject position of Man who tries to get at the origin of his own history; or from a messianic time outside of history. We may take for granted that there is no need for recourse to the subject in genealogy: we have already seen that the genealogist is prepared to sacrifice his own subjectivity in the search for knowledge. And yet, must we thereby stand outside history and memory altogether? This, let us recall, was what was so unpalatable about the messianic reduction of archaeology handed down to us by Agamben. The genealogist must straddle the need to detach himself from the interpretive process while speaking about it nonetheless within the “domain” of history. In Derridean tones, we might chastise counter-memory for the same performative contradiction found in Foucault’s first archaeology of silence. Perhaps the only thing that remains is to transpose the entire history of struggles onto the exteriority of the archive? This would, of course, assimilate genealogy to deconstruction. We have already established that the analysis of the emergence and the descent of the event must occur in the expanse of time that follows it, and on the basis of that it has found its topography in memory. Is this the same thing, however, as holding that everything occurs within the substrate which cannot be vacated but only, possibly, destroyed and re-founded anew? That the *hypomnēsis* has no ‘outside’? The indestructible ontology of knowledges disbars counter-memory from the charge of such non-contradiction. This immunity has three consequences.

First, we have already seen that, in retaining the distinction between ‘truth’ and ‘knowledge’, Foucault allows us to avoid the force of destruction, and to replace it with the relativism of ‘savoir’, and relativism is always a *position of discomfort*. In the distinction between intelligibility (a self-aware knowledge-*savoir*) and interpretation (which always aims for the status of knowledge-*connaissance*, of ‘truth’), the genealogist makes no effort to supplant the archive notwithstanding that his work is only possible on the basis of the stillness and posterity of the latter. Rather, the task of genealogy is to locate the constitutive event of the archive; to show the non-necessity of its content without providing any alternative. Certainly, Foucault states: “the further one breaks

³⁷³ Ibid., 147.

down the processes under analysis, the more one is enabled and indeed obliged to construct their external relations of intelligibility”³⁷⁴, but this is not because of the historian’s own need to make a decision, to commit further legal violence or to ‘construct’ what has been ‘destroyed’ in order to speak at all, as is the case when there is nothing outside of the text. Let us say instead that genealogy leads to destruction only incrementally *and only by way of construction*: in the moment that it establishes relations of intelligibility as error, accident and the outcome of struggle, it dispels the claim of these meanings and interpretations to “truth”. Deconstruction, on the other hand, constructs in spite of its destruction, and in the same moment: deconstruction moves only within the text, which it would continuously destruct were it not for the need to put forward its own position.

Finally, just as ‘truth’ is distinguished from ‘being in the true’, there stands opposed to the Derridean ‘text,’ outside which there is ‘nothing,’ an infinite mass of texts, of knowledges and practices, grouped together as ‘being in the true’, an element that can be destroyed without relinquishing all knowledge: without, that is (and contrary to several critics of Foucault), destroying the foundation of knowledge-*savoir* from which we speak. And so genealogical inquiry is not a question of infinite, unceasing destruction (interrupted from time to time by a necessary construction that we must perform simply in order to speak); rather it is a serial, *sequential historical practice*, falling short of ethics and freedom, responding not to an ethical call to freedom or justice but simply responding to an instinctive will to know, which will repeat itself in the play of struggle and domination, and which will carve out the possibility of emergence of other ways of ‘being in the true’ without substituting any such significance or meaning in the place of what it exposes as error. And so while the process of deconstruction continues in one uninterrupted, negatively dialectical motion; genealogy *recurs*. That is to say, it recurs without continuation: its very content is a backwards-facing (re)construction of a history of struggle, rather than an advancing inquiry into, or anxiety over, something that is ‘still to come’.

Taken together, these factors indicate the nature of the limit, between struggle and substrate, upon which genealogy proceeds. On one hand, counter-memory salvages that which was put at risk in Agamben’s archaeology – memory itself. In genealogy, we may dispel the ‘truth’ that is maintained in the archive, but because we do so within the boundaries of these three distinctions – the recurring fact of ‘being in the true’ of which we may construct an *intelligible* history while destroying its own claim to absolute truth – we do not thereby destroy the *possibility* of the archive itself, as we might have hoped to do under the auspices of inoperativity. Similarly, because we operate on a level distinguished from struggle and interpretation, neither do we

³⁷⁴ Foucault, “Questions on Method,” in Gordon, Miller and Burchell (eds) op. cit. supra. n. 202, at 77.

perpetuate that same archive by moving interpretively within it. We neither produce it nor do we destroy it: we simply contest its contents. Counter-memory has no concern for futurity: it does not share in the grammatical form of archaeology or of deconstruction.

It would appear, then, that the space in which rules are derided and forced into malicious and ironic positions belongs to the real level of struggles. But as we shall come to consider, the practice of subverting rules is not straightforward: in order to subvert rules and use them ironically, we must first speak to them in their own language. This is the central problem in much of critical legal thought, and cannot simply be assumed for the level of practices. In order to allow for this subversion, then, one must imagine a legal practice that is also a form of Sophism. Whether deconstruction or ‘inoperativity’ are adequate to this task remains also to be seen. In any case, it is not suited to the brutal honesty of counter-memory. There is a space, however, for the development of this practice in archaeology – or so I shall argue.

The Necessity of Archaeology

A series of rebuttals – or at least, revisions – of some of the secondary depictions of Foucault’s methodology can now be made. First, it is possible to give further nuance to Gary Gutting’s introduction to the relationship between archaeology and genealogy, insofar as he claims that “genealogy goes beyond archaeology by explaining (through the connections with power) changes in the history of discourse that are merely described by archaeology”³⁷⁵; and that the development of the genealogy “is a matter of...returning archaeology to its role of describing both discursive and nondiscursive practices”³⁷⁶. The opposition³⁷⁷ of description to explanation does not adequately capture the fact that the two methods refer to different aspects, different levels, of investigation. Certainly, in one of Foucault’s own explanations of the relationship between the methods, we are told that,

“If we were to characterise it in two terms, then ‘archaeology’ would be the appropriate methodology of the analysis of local discursivities, and ‘genealogy’ would be the tactics whereby, *on the basis of the descriptions* of these local discursivities, the subjected knowledges which were thus released would be brought into play.”³⁷⁸

³⁷⁵ Gutting, *Michel Foucault’s Archaeology of Scientific Reason*, supra. n. 190 7.

³⁷⁶ Ibid., 270.

³⁷⁷ Gutting, of course, does not render this a simple opposition, but my point is that there is more to the archaeology understood in the context of the level of regimes of truth that it also designates

³⁷⁸ Foucault, “Two Lectures”; in Foucault, *Power/knowledge*, 85.

But in other contexts, even in later years, Foucault revealed that there was more to archaeology than a mere description of ‘local discursivities’ – that a type of movement from the empirical description of these discursivities to a level on which their significance as systemic ‘positivities’ is involved:

“In short, it seems that from the empirical observability for us of an ensemble to its historical acceptability, to the very period of time during which it is actually observable, the route goes by way of an analysis of the knowledge-power nexus supporting it, recouping it at the point where it is accepted, moving toward what makes it acceptable, of course, not in general, but only where it is accepted. This is what can be characterised as recouping it *in its positivity*. Here, then, is a type of procedure which, unconcerned with legitimising and consequently, excluding the fundamental point of view of the law, runs through the cycle of positivity by proceeding from the fact of acceptance to the system of acceptability analysed through the knowledge-power interplay. Let us say that this is, approximately, the *archaeological level*.”³⁷⁹

When we proceed ‘from the fact of acceptance to the system of acceptability,’ when we place an ensemble in the context of its ‘historical acceptability,’ do we not therefore attach to it a new character, beyond its empirical observability? The archaeological method “recoup[s] [an ensemble] in its positivity” by situating it on the ontological level that is proper to it, understanding it in an archaeological light that moves beyond mere description to the analysis of systems.

Secondly, the apparent substitution in Dreyfus and Rabinow’s understanding of the sphere of ‘rules for the formation of discourse’ (secondary rules) for the Nietzschean ‘interstice’ in which struggles over meaning take place is no longer methodologically defensible: given the indestructability of the level of ‘rules’ we witness, in the addition of the ‘interstice,’ not a displacement of one ‘clearing’ for another, but rather the orthogonal crossing of two separate investigations into what can only be described as a shared “object” under conditions that force the tectonic shifting of these distinct topographies into a temporary unity. While genealogy certainly explains the extant content of an indelible stratum of marks and memory, of otherwise ‘empty rules,’ it does not account for the existence of that level or the rarity of its objects: only archaeology can deliver a history of those objects at the level of their distinct ontology.

Alongside these refusals, we also encounter, in light of the investigations outlined above and which provided so many paths for the ascertainment of a “Foucaultian Law”, a series of consequences for the study of law *in general*, which stem from the newfound imperviousness of

³⁷⁹ Foucault, M “What Is Critique?,” in Foucault, *The Politics of Truth* supra. n. 266, at 61 .

the level of the archive. First, the ‘empty rules’ at stake in the struggle over meaning are incapable of being captured in the dimension of their existence by genealogy rendered as counter-memory, and so it follows that the exhaustion of the content of legitimate rules does not wholly account for the fact that ‘legitimacy happens’. Opposed to an understanding of law as, for example, instrumental rationality, an exposition of the interests that make up the structure of the law does not diminish its persistence as a type of object. But does this not give the system of rules the same character of ‘relative autonomy’ that we find in Marxist theories of law? In Marxism, of course, the ‘heavy burden’ of relative autonomy lay in “assert[ing] both the specificity of legal doctrine and, at one and the same time... assert[ing] its connectedness to external socioeconomic relations”³⁸⁰: Alan Hunt explains that, for Engels, it was part of the law’s ideological function that it should secure for itself the semblance of autonomy over the economic interests that it would nevertheless consistently serve – a suggestion that proliferated a problematic “concept without a theory”. Are we joining in the tradition that searches for such a theory? Might we find a similar structure at work in the ontological stratum of ‘rules’ which lie in wait for dominant interests to occupy them, and for us to understand them as ‘law’? Without dwelling too long on the point of Foucault’s putative ‘Marxism’³⁸¹, we might draw on Stuart Hall’s discussion of Nicos Poulantzas’ efforts to draw Foucault’s knowledge-power apparatus into a theory of the State. Hall, introducing Poulantzas’ work, counters that the perceived ‘failure’ of Foucault’s work to acknowledge the ‘crystallisation’ of power-knowledge in the institution of the State is misplaced: among other things, he explains that “Foucault is not simply pointing, in particular instances, to the proliferation of discourses. He is advancing a theory of their *necessary heterogeneity*”³⁸². Relative autonomy, like the hegemony to which it is closely related³⁸³ can only be encountered on the basis of class differences; but the dispersal of *multiple* discourses at any given time for the circulation of power is informed in the first place by the Foucaultian suspicion that to focus on the “State” or the question of class hegemony alone would be ineffective against the insidious operation of power in excess of the State, under the State, and even *without* the State. If rules ‘lie in wait’ for the content of dominant interpretations, it is not to suggest that they are not multifaceted, heterogeneous and prone to subversion. It is not, moreover, the case that these rules explicitly set out the law: systems of acceptability are far more

³⁸⁰ Hunt, A *Explorations in Law and Society: Toward a Constitutive Theory of Law*, (1993) (London, Routledge) 166.

³⁸¹ I will take at face value Foucault’s attempt to distance his work from Marxism, albeit that there has been attributed to him the context of his *Archaeology* the task of pursuing a “nonfalsified Marxism” that would “help us to formulate a general theory of discontinuity, series, limits....” And so on. Foucault, “Critical Theory/Intellectual History (Interview),” 135.

³⁸² S. Hall, introduction to Poulantzas, N *State, Power, Socialism*, trans. P. Camiller (2014) (London, Verso) xiv.

³⁸³ Again, the notion of “hegemony” applied to Foucault is a complicated issue that I cannot address adequately here; however, see Laclau, E and Mouffe, C *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics*, (2nd ed) (2001) (London, Verso) chap. 3.

elusive than the 'law-object' connected with the 'State' and concentrated at the centre or the apex of 'the social', with which we are accustomed to dealing.

It follows, then, that we must show that the 'law-object' that we are dealing with, and which the previous chapter described as the positivity of the 'historical *a priori*' is not a 'determinate object' that simply proceeds undisturbed through a theory of power. We saw above that this was Minkkinen's critique of Ewald: it is possible that we may extend this criticism to the centrality of the 'law' in the fluctuation of power in Golder and Fitzpatrick's analysis, notwithstanding its apparent 'irresolution'. For what are we to understand as being changeable about this law that is both 'determinate and responsive'? Its form or its content? In its 'determinate' dimension, law as a discursive practice corresponds to a set of fixed ideas, either as 'law' proper – the self-describing institutions of 'law' within the state – or as 'infra-legal practices' pertaining to disciplinary practices. The simultaneous openness of these discourses and practices does nothing to alter the historical continuity of their forms, and so despite their own similar criticism of Ewald's 'containment' of the law³⁸⁴, Golder and Fitzpatrick cannot but give their own law a 'substance' if it is to exist at a level mundane enough to be affected by the play of power in the form of group positions and strategies. I suggest this because, with Taylor, I must concede that Foucault's Nietzscheanism prevents the possibility of understanding resistance as strategies of freedom: thus they cannot coincide with the level of struggle. And so to posit the law as 'responsive,' one must find a place for it below this level of fundamental social determinations of truth and acceptability.

So much for Golder and Fitzpatrick; but *against* Taylor, who, instead of bringing the law to the level of struggle, brings struggle to the level of law (as regime), I also doubted whether forms of resistance could be re-characterised as 'freedom' on the basis of a retroactive and internally relative history of ourselves that could identify the 'good' involved in 'being otherwise'. Nevertheless, I proposed at the conclusion of that section that there may be a way of doing history that engaged in the necessary irony and malice needed in the Nietzschean schema of the will to power to capture 'rules', as abstract and ontologically peculiar as they might be, as empty as they might be, and to use them *against themselves*. My inclination that archaeology is the method whereby this might be achievable will be justified or unfounded on whether or not we can consider the historical *a priori* as something corresponding to the curious ontology that I have persistently claimed for the level of empty rules, archive, knowledge-*savoir*. This argument is not straightforward: in the first place, those analyses of the 'historical *a priori*' that emphasised its prescriptive over its historical nature would consign it to an epistemological function with a

³⁸⁴ See in particular Golder and Fitzpatrick, *Foucault's Law*, 102 et seq.

history, despite Foucault's protests to the contrary. This would give it a 'transcendental' nature that would not depend upon the ontological level set out for those 'systems of acceptability' that continue in the element of knowledge. Perhaps we can seek refuge for this peculiar ontology in the place where it has received most attention: in Deleuze's discussion of the 'exteriority' of light and language as the substance from which visibilities and statements are formed?

Confusingly, Deleuze writes that "being *a priori* is... historical *and* epistemological rather than phenomenological"³⁸⁵. But this "epistemology" is also inextricable from the 'being-there' of 'quasi-incorporeal' substances. Systems of rules of acceptability of discourse are bound up with the ontology of statements, the regularities between which, as we have seen, engender the 'discursive formation' to which they belong. The ontology of statements, in turn, corresponds to what Deleuze calls 'exteriority': as we have seen, this means something *more* than the fixed location between instances of power that Golder and Fitzpatrick give to the word. For Deleuze there are 'forms of exteriority,' comprising light (statements) and language (visibilities): "there is a 'there is' of light, a being of light or a light-being, just as there is a language-being. Each of them is an absolute and yet historical, since each is inseparable from the way in which it falls into a formation or corpus."³⁸⁶ Deleuze actually names these forms in the language of the 'historical *a priori*'; but apparently he does not consider their grouping together to be problematic. He explains that Foucault "seeks to isolate [the] enunciative 'regularities' [of words and texts, phrases and propositions], for however much they may differ, they are all produced in the same age"³⁸⁷; and without any further problematisation of the parameters of an 'age', concludes that "[f]rom this point on the conditions, or *a priori* of the statement, are themselves historical: the great murmur, otherwise known as the language-being or the 'there is' of language, varies in each historical formation..."³⁸⁸. But this is not to make the most of Foucault's own statement that the historical *a priori* "is *defined* as the group of rules that characterise a discursive practice"³⁸⁹: this suggests not a set of conditions grouped together because of their 'belonging to an age', but rather, inversely, a grouping that reflexively determines its own parameters. Since statements make up the substance of the 'discursive formation' to which we give the legal title 'historical *a priori*' in its *unity* – and therefore in its discrete historical existence (I explain this in detail in the previous chapter) – I propose an extended reading of the ontology of Deleuze's statements and visibilities to the 'historical *a priori*' itself, as so many *forms* of the being of light and language.

³⁸⁵ Deleuze, G *Foucault*, supra. n. 299, at 51. We may leave the aspect of 'phenomenology' aside, for we have already considered that 'being in the true' is not quite the same thing as 'being' – of which I will say more momentarily.

³⁸⁶ Ibid., 50.

³⁸⁷ Ibid., 48.

³⁸⁸ Ibid.

³⁸⁹ Foucault, *Archaeology of Knowledge*, 144 emphasis mine.

This is certainly an *extension* of Deleuze's thesis: it is far less problematic to attribute some sort of quasi-phenomenality to light and language. In *Plato's Pharmacy*, which I discussed in the first Chapter, Derrida places the indirect light that does not emanate from the Sun and the echo that does not come from the voice of God, the *hypomnema* that Socrates recounts in the story of Theuth, into a category of beings without presence: *ana-logos* forms of light and language that are not guaranteed by the Sun-King-God himself³⁹⁰. The *ana-logos* realm of traces, sounds, visibilities – what Deleuze will refer to as the 'audio-visual archive' of light and language can be imagined, without too much trouble, in an existence ungrounded by Logos, the God whose voice is language or the Sun from which light emanates. But to give some sort of 'being' to the groupings of these *ana-logos* traces, and to imagine that it has a continuity, a life of its own, is far less evident: for it is in any case the problem of 'origins' that is excluded from the *ana-logos* sphere, and to group light and language into a form must run very close to the task of giving them a *source* of intelligibility. And yet there is hope. Elsewhere in the text, Deleuze quotes directly from the *Archaeology*:

"...the historical being of language...constitutes a form of exteriority in which the statements of the corpus under consideration appear by way of dispersal and dissemination. It is a distributive unity. "The *a priori* of positivities is not only the system of a temporal dispersion; it is itself a transformable group".³⁹¹

Is this to suggest that the 'form of exteriority,' the 'historical being of language' and the 'distributive unity' are the same thing? Further, the light and language 'beings' "are two forms of exteriority within which dispersion and dissemination take place"³⁹², giving substance to the idea that dispersion of *statements* corresponds to the form of exteriority which could possibly denote its coincidence with the system of rules of dispersion. Leaving behind Deleuze's original text but drawing still very close to it, the 'juridical matrices' elaborated in Minkkinen's piece, as so many 'structural reductions' of the rules for the visible and the sayable, can also lend itself to a reading in which such 'matrices' can be evaluated in their own right, that their history can be written – that, in short, they could have a life of their own. Of course, this is not reducible, in Minkkinen's view, to "Foucault's law": the law does not take the form of the 'juridical matrix' itself, but rather the juridical matrices indicate an unspoken understanding of law as the will for the production of truth. The matrices appear as the many modalities in which this will is played out – not as the beginning and end of the essence of "law" as an "object" (a view Minkkinen explicitly rejects in

³⁹⁰ See "Plato's Pharmacy", notably the section entitled "The Filial Inscription" in Derrida, J *Dissemination*, supra. n. 16, at 84 et seq. See also his reference to the "*analogous* order of the sensible or the visible" in the same piece, at 83.

³⁹¹ Deleuze, *Foucault*, 49.

³⁹² Ibid., 51.

any case). Nevertheless, their history *could be written*. Perhaps this would be the history of an epistemological object? To avoid the trap of the ahistorical “law object”, I propose that we add to the quasi-incorporeal materiality of statements and visibilities (which are already potentially groupings and not actually singular instances) an unphilosophical attitude towards the law. A legal archaeology, in order to maintain the curious ontology of ‘groups of rules’ for the formation of statements, and therefore the curious “essence” of the system of law that can be traced, must deliberately adopt a Sophist ontology.

Halfway through the series of *Lectures on the Will to Know*, Foucault addresses this type of ontology, in order to denote its Aristotelian banishment from the province of Western philosophy. The Socratic aversion to the Sophists, he explains, concerned what the former considered to be the ‘pseudo reasoning’ of the latter. The Sophist form of argument entailed the placing of propositions next to each other non-syllogistically; proceeding by way of paradox, contradiction and word-play – a form of argumentation grounded on “bad faith”³⁹³. Sophism is distinguished from ‘apophantic discourse,’ in which an utterance is capable of being true or false at the “sole (always ideal) level of its signification”³⁹⁴; and so in genuine discourse, ‘being’ in the form of a predication, could stand outside of the sphere of argumentation and allow utterances and counter-arguments to encounter each other in light of this pre-existing truth against which they might be measured and find the scheme of their interaction. In Sophist discourse, by contrast, “[t]here is no recourse to a “meta-linguistic level of arbitration””³⁹⁵: utterances “[do] not take place in the dimension in which words are signs,” but rather have ‘truth’ only insofar as the utterances themselves exist. While apophantic discourse “has a relation to being – not at the level of its existence, where it is event, where it takes place, but at the level of *what* it says”, and while “it speaks of being or non-being”³⁹⁶; ‘being’ in Sophist utterances corresponds only to the fact of the existence of those utterances themselves. In Sophism, “[d]iscourse is separated from what it speaks about by the sole fact that it is itself a thing, like what it speaks about”; and so the Sophist manipulates the statement in its “paradoxical materiality”³⁹⁷ by opposing utterances not by virtue of their correspondence to a shared set of predicates, but of their material incompatibility, to the effect that Sophistically non-compatible statements come into conflict but without any regard for what they might signify, and regardless of the fact that they may not be incompatible in light of any possible signification. It is thus the materiality, the existence, of the statement that is a measure of its “truth”. Foucault attributes to the utterance of the Sophist a fivefold strangeness:

³⁹³ Foucault, *Lectures on the Will to Know*, 58.

³⁹⁴ Ibid., 65.

³⁹⁵ Ibid., 60.

³⁹⁶ Ibid., 64.

³⁹⁷ Ibid., 62.

“a bizarre, partial, restrictive, discontinuous, and shaky ontology”³⁹⁸. Given this ontology which is not connected to ‘being’ as such but has a curious ‘being’ of its own, there is no extra-linguistic basis on which to adjudge the truth or falsity of the Sophist’s utterance: only its relationship to another statement which it either matches or rejects. Thus the reasoning of the Sophist was not ‘true’ by any exterior account: it was not ‘true reason’ at all, only an appearance of reason. And so, Foucault explains, “Plato will be able to define the Sophist as the man of appearance and simulacrum”³⁹⁹

Deleuze expands on this aspect of Platonism in *Plato and the Simulacra*. Plato, he tells us, discovers in the *Sophist* the distinction between copies and simulacra: copies are “well-grounded claimants, authorised by resemblance. *Simulacra* are like false claimants, built on a dissimilitude, implying a perversion, an essential turning away.”⁴⁰⁰ The distinction allows the determination, for example, of copies of the image idols as against the false claimants or simulacra that bear the burden of curse and counterfeit, the embodiment of an evil. The Platonic motive “is a matter of choosing claimants, of distinguishing the good from the false copies”⁴⁰¹ by referring to a model, in the same way that the apophantic discourse allowed the distinction between truth and error by reference to an extra-linguistic world of being and predicative truth. The distinction between copies and simulacra are material to our understanding of systems and heterogeneous series. Deleuze explains the distinction thus:

“Let us take the two formulations: “only that which is alike differs,” and “only differences are alike.” Here are two readings of the world in that one bids us to think of difference in terms of similarity, or a previous identity, while on the contrary, the other invites us to think of similarity or even identity as the product of a basic disparity. The first one is an exact definition of the world as icon. The second, against the first, defines the world of simulacra”⁴⁰²

In the first series, then, we understand seriality by reference to a ‘model’, which allows us to pick out variations of the same. But in the ‘world of simulacra’ it is difference that comes first, and the process of bringing differences into a series involves an act of ‘aggression,’ a falsification of a sign that allows one thing to communicate systemically with another. What is important, says Deleuze, is that the constituting disparity must “be judged in and of itself, not prejudged on the basis of any previous identity, and that it have *dispar* as its unit of measure and

³⁹⁸ Ibid.

³⁹⁹ Ibid., 67.

⁴⁰⁰ Deleuze, G trans. R. Krauss, “Plato and the Simulacrum,” *October*, Vol.27 (Winter 1983), pp 45-56, 47.

⁴⁰¹ Ibid., 48.

⁴⁰² Ibid., 52.

communication”⁴⁰³; neither of the elements linked can have the status of model or copy, “there is no possible hierarchy”. The institution of that resemblance between different objects with no common model cannot be really ‘false’, but instead is to be grasped in terms of its power, the ‘power of the false’, and the madness or joyfulness with which it asserts difference in a moment of ‘de-founding’.

Deleuze also understands Foucault’s archaeology in light of its task of “problematizing series”:

“Whether discursive or not, formations, families and multiplicities are historical. They are not just compounds built up from their coexistence but are inseparable from ‘temporal reactors of derivation’; and when a new formation appears, with new rules and series, it never comes all at once, in a single phrase or act of creation, but emerges like a series of building blocks, with gaps, traces and reactivations of former elements that survive under the new rules. Despite isomorphisms and isotopies, no formation provides the model for another.”⁴⁰⁴

This forming of sequences made out of non-exemplary formations resonates with the fact that, “of the at least two divergent series interiorized in the simulacrum, neither can be assigned as original or copy”⁴⁰⁵. In the first instance the ‘statement’ is considered in its pure materiality, its ‘there is’ of language; and I would suggest that we can treat visibilities, or the non-discursive, in the Sophist ontological understanding of their ‘existence’ – it is their ‘quasi-incorporeal materiality’ rather than their affirmed correspondence to a particular ‘meaning’ that is decisive for the archaeologist. Dreyfus and Rabinow call this lack of concern for the ‘seriousness’ of serious meaning a ‘phenomenological double-bracketing’ – and perhaps this closeness to phenomenology has accounted for so many accusations of the ‘structuralism’ or ‘human scientific’ nature of the archaeology. But perhaps we can attribute a different sense of detachment from the perspective of Sophist ontology: statements coincide by virtue of the consistency of their materiality, which coincides with the truth of their content; and they may be grouped together accordingly. This is not the same thing as the grouping together of observable and recurring facts. Deleuze explains:

“It seems that all phenomena, insofar as their ground is located in dissymmetry, in difference, in constitutive inequality, correspond to these conditions: all physical systems are signals, all qualities are signs. It is true nonetheless that the series that border them remain exterior; and by the same token the

⁴⁰³ Ibid.

⁴⁰⁴ Deleuze, *Foucault*, 19.

⁴⁰⁵ Deleuze and Krauss, “Plato and the Simulacrum,” 53.

conditions of their reproduction also remain exterior to other phenomena. In order to speak of the simulacrum it is necessary that their difference be *enclosed*.⁴⁰⁶

Statements are enclosed and unique, and entail series of utterances of similar closure and uniqueness. To group them together is a first imposition of simulacra. Discursive formations consist in the regularities that are to be found between series of statements at a particular point in time; but discursive formations also ‘legislate’ for the possibility of existence of these very statements, as we saw. Might we not understand this sequence as the imposition of a system of signs upon enclosed forms, in a manner that demonstrates the difference between these statements, the impossibility of grouping them together in accordance with an *a priori* model? This allows us to treat statements and historical *a priori* consistently. When we discern the unity of a given discursive formation as a system of acceptability for statements (likewise in the non-discursive practices for visibilities) we fashion a system without model. And if we are in the business of fashioning systems of acceptability, then there must be a way of understanding the object of our practice – of giving it some sort of ‘generality’. The historical *a priori* is the name that we give to that formation of ‘system’ which repeats throughout the course of our investigation and yet which is significant because it can be systemically, which is to say historically, ‘enclosed’. The “Law of law” designated in the historical *a priori* can be read alongside not only Foucault’s implied Sophism, but also alongside Deleuze’s anti-Platonic characterisation of Foucault’s archaeology. The historical *a priori* is therefore not a “law object” in the determinate sense: it takes its positivity as ‘simulacra’ from its belonging to our archaeological practice. Thus:

“It is indeed Being, but only when “being” is for its part simulacral. The simulacrum functions in such a way that resemblance is necessarily retrojected onto the base series, and an identity is necessarily projected onto the forced movement”⁴⁰⁷.

If the “Law of law” in a legal archaeology is the difference and repetition of groups of discursive formations, enclosed and unified as so many *simulacra* – perhaps we can give to legal archaeology a position among the Sophists. Perhaps we can assess it for its ability to replicate, through counterfeit and malice, the epistemological purity of positivist, systemic attempts to construct a universal “law object”? To pose it as a system of counterfeit and degradation, a false copy of legal thought, we might encounter both its destructive, ungodly power and its political promise.

⁴⁰⁶ Ibid., 52.

⁴⁰⁷ Ibid., 55.

Chapter Four

Applying Legal Archaeology

Critical legal thought necessitates that we devise ways of overthrowing the distinctions law forces between public and private, politics and the Political, between those who have and have-not rights, those whose discourses and lives may be presented publicly in meaningful ways and those who are discursively excluded from the very sphere of the institutions that govern them. Two concerns intersect in this vein: the exclusion of the political from the perspective of law; and the legal and institutional overdetermination of lived politics as what Claude Lefort calls “the Political,” which is “revealed, not in what we call political activity, but in the double movement whereby the mode of institution of society appears and is obscured”⁴⁰⁸. To address one dimension of the problem is not necessarily to address the other; and while the redemption of ‘democracy’ or ‘politics’ from the clutches of legal-institutional ideology remains a formidable venture, the obverse process – of bringing politics to law – resonates even more onerously. In particular, the usefulness of political strategies “before the law” (whether in practice or theoretically) is contingent, it has been argued, upon the manner in which they are fit to engage with the legal form; and upon whether or not they are able to some “point of entry” into the law, which has a proclivity to close upon itself, excluding differences according to the drawing of lines and divisions of which it is itself the arbiter. It is to the latter task that I wish to address legal archaeology, in the context of its potential theoretical application. In order to do this, I will refer to the formulation of a very similar strategy for the task of politics in Jacques Rancière’s thinking of *dissensus*. This strategy has a wider application throughout his work on the ‘politics of aesthetics’ and I do not wish to problematise its efficacy in the context of politics *in general*. Instead, I wish to concentrate upon one piece in particular, an essay written a decade ago concerning the so-called Rights of Man, in which we encounter Rancière at the point of his closest approach to the law. Unsurprisingly, this is an essay in which he strives for the emancipation of “Rights” from the depoliticising divisions drawn between “Man” and “citizen” according to modalities of political thought that cleave to rigid forms of authority to the extent that we might, without too much disingenuousness, call them ‘legal’. He opposes politics as *dissensus* to the curtailment politics engendered by this legal distinction; but I ask whether the redemption of democracy from the point of view of the law is the only strategy to which the

⁴⁰⁸ Lefort, C. “The Question of Democracy” in Lefort, C. *Democracy and Political Theory*, (1988) (Cambridge, Polity and Basil Blackwell), 11.

form and structure of *disensus*, understood as ‘placing one world within another’ may be used; whether it might find its legal counterpart in the structure of legal archaeology; and whether this legal archaeology can inscribe something like a politics of aesthetics into the thinking of law itself, in furtherance of the critical legal task of bringing politics *to law*.

The Rights of Man

Rancière problematises the distinction between “the Rights of Man” and the rights of the citizen that is to be found across a number of political perspectives, from Edmund Burke, for whom the “Rights of Man” were a revolutionary sham, to Arendt’s entrenchment of the distinction in the opposition of the public and the private life, and finally to Agamben’s ‘completion’ of Arendt’s interpretation in the opposition, and indistinction, of *zoe* and *bios* in *Homo Sacer*. For Arendt, he explains, the distinction rendered the Rights of Man abstract and ineffectual in opposition to the rights of the citizen; it entailed a confusion of the spheres of political and social freedom – one opposed to domination, the other to necessity. In this regard, the Rights of Man were “the paradoxical rights of the private, poor, unpoliticized individual”⁴⁰⁹, and thus the rights of the refugee who does not belong to the law, and for whom, she assumes, there is no oppressor. This “state beyond oppression” would be taken up several decades later, and transformed, in Agamben’s Foucaultian-Schmittian revival of the “state of exception”. As Rancière denotes, there was certainly oppression of those stateless people to which Arendt referred; and Agamben’s turn to biopolitics allows him to show this oppression by theorising sovereign power alongside the lawlessness of governmental practices, in a manner that links this public-private distinction to the potential for, and increasing proliferation of, exceptionalism in which life is dangerously captured and excluded.

Agamben’s presentation of the nexus between sovereign authority and the exercise of power in modern democracies corresponds to his insistence that the thinking of sovereignty cannot be conducted, as Schmitt had suggested, under the aegis of Political Theology, which understands the transcendental being of God as unified and singular and extends the theory of that unity onto the theory of Sovereignty, unifying power and authority in a transcendental figure⁴¹⁰; but instead must be considered in light of economic theology, which concerns a

⁴⁰⁹ Rancière, J “Who Is the Subject of the Rights of Man?,” *The South Atlantic Quarterly*, Vol.103, Number 2/3, Spring/Summer 2004 297-310, at 298.

⁴¹⁰ Schmitt, C. *Political Theology: Four Chapters on the Concept of Sovereignty* trans. G. Schwab (2005) (Chicago, University of Chicago Press)

‘fracture’ between the being of God (the domain of theology) and his ‘praxis’ (*oikonomia*)⁴¹¹. In the latter arrangement, the ‘being’ of God is mysterious and without unity or specificity; instead it is wholly contingent upon its exercise through His ‘ministries’. Likewise these ministries do not act on their own power, but are simply the praxis or apparatus of a higher being whose power is distributed entirely throughout this ‘economy’ as praxis. This is what Agamben calls *oikonomia*, a functional coupling of being and praxis in which sovereign power is wielded intrinsically but in which the position of the sovereign being is consistently vacant – there is a void at the heart of sovereign government. In much the same manner, modern democracies function by vacating the place of the Sovereign, the executive function of which is now distributed through the praxis of dispersed apparatuses of biopolitical governance. At the same time, the ‘democratic’ face of power that apparently emanates from the *bios*, the political life, of the human as constitutional subject, is always marked by the sovereign nature of the power that it allegedly instils and to which it is always subject. For despite the fact of its biopolitical nature, this form of governance is no less “Sovereign”, as most readings of Foucault would have it: and the ‘state of exception’ over which the Sovereign may decide is now inscribed into every detail of governmental praxis, as its constant potential. The *bios* of political life is thus caught up in a zone of indistinction with the *zoe* or biological life over which biopolitical governance is exercised⁴¹². In the absence of a Law of law, which is to say in the absence of a singular figure for political authority to which responsibility for the exception can be attributed, sovereign power is now mediated at every point in the exercise of biopolitical governance, engendering not only the dangerous inextricability of the polarities of life as *zoe* and *bios*, which are indistinct from the perspective of the sovereign power that may at any time strip life of its political qualification; but also the totalisation of this zone of indistinction into every part of life.

This position is unacceptable for Rancière, for whom Agamben’s “will to preserve the realm of pure politics ultimately makes it vanish in the sheer relation of state power and individual life”⁴¹³. Since he grounds his thesis on Arendt’s (Aristotelian) distinction *zoe/bios*, Agamben not only opposes politics to natural life on the same terms that Arendt had opposed political life to the private realm of the social and the poor, but he closes off the distinction with biopolitics, collapsing each side of the polarity into “an overwhelming historico-ontological destiny from which only a God is likely to save us”⁴¹⁴. Rancière considers Agamben’s thesis to

⁴¹¹ Agamben, G *The Kingdom and the Glory: For a Theological Genealogy of Economy and Government* (*Homo Sacer* II, 2). Trans. L. Chiesa (2011) (Stanford, California; Stanford University Press)

⁴¹² Agamben, G *Homo Sacer: Sovereign Power and Bare Life* trans. D. Heller-Roazen (1998) (Stanford, California; Stanford University Press)

⁴¹³ Rancière, “Who Is the Subject of the Rights of Man?,” 302.

⁴¹⁴ Ibid.

entail a radical ‘depoliticisation’ in which the Rights of Man become eviscerated from practice in the instance of the zone of indistinction. The polarity of bare and political life is key, for it is this that perpetuates the frustration of private life, or *zōē*, in the reduction of politics to the sphere of the ‘citizen’ that stands apart from it. Arendt’s position (“which Agamben basically endorses”) entails a “quandary” for it demands that one must stand in a relationship of derivation to the other, which cannot but be paradoxical:

“either the rights of the citizen are the rights of man – but the rights of man are the rights of the unpoliticised person; they are the rights of those who have no rights, which amounts to nothing – or the rights of man are the rights of the citizen, the rights attached to the fact of being a citizen of such or such constitutional state. This means that they are the rights of those who have rights, which amounts to a tautology”⁴¹⁵.

Agamben’s thesis is a depoliticisation of rights from the start, for it takes its lead from this quandary. But this is not cause for despair: for this depoliticisation is caused by the fact that Agamben ‘sweeps away a third assumption’ that could put an end to the frustration of private and public life in advance. For the “subject of rights” is a more complex character, from the outset, than “a single subject that would be at once the source and bearer of the rights and would only use the rights that she or he possesses”⁴¹⁶. Rather, the subject of the rights of Man is a surplus figure, reducible to neither “Man” nor “citizen”; rather, this subject breaks the reductive tautology apart by demonstrating that it ‘does not have the rights that it has and has the rights that it has not’.

Two things are at work here: first, the issue of the ‘surplus figure’; secondly the possession of its rights by virtue of its ‘demonstration’. Taking the surplus first: Rancière finds a point of departure from which to escape the reductive-tautological thinking of democracy in Plato’s enumeration of the bases for governmental authority. In *Does Democracy Mean Something?*, Rancière explains the formulation of six grounds of *arkhè*, understood as the ‘distribution of power between rulers and ruled’ and the ‘temporal beginning entailing that the fact of ruling is anticipated in the disposition to rule’⁴¹⁷; alongside a paradoxical “seventh”:

“which Plato calls the ‘drawing of lots’, or democracy... [which] is neither a pre-determined distribution of roles nor an attribution of the exercise of power to a disposition for ruling. The ‘drawing of lots’

⁴¹⁵ Ibid.

⁴¹⁶ Ibid.

⁴¹⁷ “Does Democracy Mean Something?” in Rancière, J trans. S. Corcoran (ed), *Dissensus: On Politics and Aesthetics*, (2010) (London, Continuum), 51.

presents the paradox of a ‘qualification without qualification’, of one that spells the absence of the *arkhè*.”⁴¹⁸

Democracy, accordingly, “is the power of those who have no specific qualification for ruling, except the fact of having no qualification”⁴¹⁹. And insofar as there are rulers and ruled, there will always be this supplementary part that escapes the logic of the *arkhè* – the latter is not reducible either to the public or the private, to bare life or politics; it is instead “an empty part that separates the political community from the count of the parts of the population”⁴²⁰. It overcomes the opposition that either collapses into void or tautology, and allows it to survive even the insidious biopower that would place it in a zone of indistinction. Politics, properly viewed thus “separates the whole of the community from itself” by “oppos[ing] two counts of counting it”⁴²¹ – the count of the two parts alone, and the count that includes the ‘part of no part’.

This is what Rancière refers to as ‘dissensus’ – a “division put in the ‘common sense,’” the latter of which is prone to being distributed by the power of the law and the state and entrenched as self-evident by virtue of a distribution of the sensible that Rancière calls ‘police’, and thus given the polar distinctions of ‘public’ and ‘private’ that miss out the supplementary ‘part of no part’ and renders its own set of distinctions obvious or self-evident by disbar[ring] any engagement with the ‘sensible’. “Politics,” he explains, “consists in transforming this space of ‘moving-along’ [“There’s nothing to see here!”], of circulation, into a space for the appearance of a subject: the people, the workers, the citizens.”⁴²² A dissensual practice, then, will transform a private space, such as the factory, into a public space whenever workers assert their supplementary existence as political subjects. This is the practice of “demonstrat[ing] a gap in the sensible itself”, of “placing one world in another”⁴²³ – namely, bringing to bear upon the world of one count (private/public) the world of a different count (of the supplement) by demonstrating the second, causing a sensory disjunction, a ‘shock’ to common sense.

In the case of ‘rights’, the task of politics is to seize upon the sensible in the same way, the latter being given to common sense in the first instance:

“First, they are written rights. They are inscriptions of the community as free and equal. As such they are not only the predicates of a nonexistent being. Even though actual situations of rightlessness may give them the lie, they are not only an abstract ideal, situated far from the givens of the situation. They are also

⁴¹⁸ Ibid.

⁴¹⁹ Rancière, “Who Is the Subject of the Rights of Man?,” 305.

⁴²⁰ Ibid.

⁴²¹ Ibid.

⁴²² Rancière, J “Ten Theses on Politics,” in Rancière, J. *Dissensus* supra. n. 417, 37.

⁴²³ Ibid., 38.

part of the configuration of the given. What is given is not only a situation of inequality. It is also an inscription, a *form of visibility of equality*.”⁴²⁴

Since it has issued the predicates of these rights by inscribing them, then, the law comes to bear upon something outside of it – the community – and distributes its sensibility by virtue of this inscription. But political subjects can put “Man”, as a political name “to the test”: “[t]hey not only confront the inscriptions of rights to situations of denial; they put together the world where those rights are valid and the world where they are not. They put together a relation of inclusion and a relation of exclusion”⁴²⁵. The space of politics properly understood is the space of this dissensus and common sense that come into conflict with each other.

This is the politics, then, that Rancière opposes to Agamben’s ‘depoliticisation’ tendency towards the question of Rights. But the very fact that we are dealing with ‘Rights’ engages a legal category which, although it can be brought into dispute in dissensual practice that placing one world within another, is too limited as to the ‘world’ into which it can be brought. Speaking of Olympe de Gouges, who argued for the extension of the rights of citizenship on the basis of the rights of “Man” on the basis that, if women were able to go to the scaffold they were entitled to be part of the assembly, Rancière concedes that “[o]f course the deduction could not be endorsed – it could not even be *heard* – by the lawmakers”⁴²⁶. “Nevertheless,” he continues, “it could be enacted in the process of a wrong, in the construction of a dissensus”⁴²⁷. The law is deaf to the claim, and yet it is being demonstrated as a ‘wrong’ – but to whom, if not in the sphere of the law in which rights are to be exercised; and to what effect? In making a claim from law in the sphere of politics, are we not making things too easy?

Rancière is opposing the view of politics that keeps within the law, which in itself is a formidable venture, since “the aim of consensual politics is the identification of law and fact” and since law constantly draws a line to exclude surplus subjects, and the thinking of politics is to be salvaged relentlessly from this common sense. This conflation of law and fact also informs his overarching criticism of Agamben, for whom the point of view of “law” (yet without a Law of law) is ‘oikonomically’ inscribed into every moment of biopolitical governance. Nevertheless, two things can be said for Agamben here. The first concerns the charge of ‘depoliticisation’: Agamben⁴²⁸ does put forward the messianic project of a ‘form of life’ that renders this distinction

⁴²⁴ Rancière, “Who Is the Subject of the Rights of Man?,” 303.

⁴²⁵ Ibid., 304.

⁴²⁶ Ibid.

⁴²⁷ Ibid.

⁴²⁸ Whyte, J “Particular Rights and Absolute Wrongs: Giorgio Agamben on Life and Politics.” *Law and Critique*, Vol. 20(2) (2009) 147-161

inoperative. Recall that Agamben's archaeology entailed an overcoming of the law: rendering inoperative by fulfilling history, in the form of a future anterior. But, agrees Whyte, it is difficult to envision how this would operate. But secondly and, I think, perhaps more importantly: Agamben speaks from the point of view of the law and demands that we remain within it: it appears a somewhat truncated argument to point out its inefficacy from the safety of a different position. Far more than defending Agamben's putative 'politics' against the charge of law, it is arguable that the surplus subject of politics is not the only thing Agamben chases out from the *oikonomia* of being and praxis. He also vacates the seat of the sovereign: he dispenses with the "Law of law" as 'mythologeme'. Aside from trying to rescue Agamben for politics, perhaps we ought to salvage his archaeology, and Rancière's dissensus too, for Law?

Bringing Politics to Law?

Under what conditions can the 'wrong' suffered by the 'part of no part' be demonstrated to the law that commits it? What might the power of dissensus hold if law is always deaf to these wrongs? If dissensual practice is a case of 'placing one world in another', then it depends, even in the abstract sense, upon a topography of 'worlds'. Those who 'have the rights that they have not' confront, not the *logic* of exclusion but the *space* on which that exclusion operates, by superimposing *worlds* instead of confronting one argument with another in the domain of logic in which a common set of predicates might exist to determine the issue⁴²⁹. In his 'politics of aesthetics', topographies for dissensual politics are self-evident:

"In the museum, which is not merely a specific type of building, but a form of framing of common space and a mode of visibility, all these representations are disconnected from a specific destination, are offered to the same 'indifferent' gaze."⁴³⁰

Can we find such a spatial equivalent in the law? There are ways of using the space of the trial subversively, of course⁴³¹. Strategies of rupture, construed by the French lawyer Verges, are a means of demonstrating the political within the physically demarcated space of the court. Of

⁴²⁹ To enjoy a shared set of predicates would be, in Jean-Francois Lyotard's idiom, a "litigation" in which the "wrong" would not be incurred in the first place. To this he opposes the concept of the differend, which is "distinguished from a litigation", and is "a case of conflict, between (at least) two parties, that cannot be equitably resolved for lack of a rule of judgement applicable to both arguments," and in which "applying a single rule of judgement to both in order to settle their differend as though it were merely a litigation would wrong (at least) one of them" Lyotard, JF. *The Differend: Phrases in Dispute*, trans. G. Van Den Abbeele (1988) (Theory and History of Literature, Vol. 46)(Minneapolis, University of Minnesota Press) xi.

⁴³⁰ "The Paradoxes of Political Art" in Rancière, J, *Dissensus*, supra n. 417, 138–39.

⁴³¹ Christodoulidis, E.A. and Veitch, S. "The Ignominy of Unredeemed Politics: Revolutionary Speech as Differend." *International Journal for the Semiotics of Law* Vol. 10(2) (1997) 141-157

course the law, and the trial process, has means of excluding, of quickly curtailing such demonstrations; these spaces of law are prone to their own ‘police’. Nevertheless the form of the trial is capable of being brought into dissensual practice: the placing of one world, of one trial form that includes the supplementary element of speaking, within another is disrupted. But this has no bearing on the logic of the law, the ‘law’ itself.

One author invites us to consider *other* “strategies of rupture”, outside of the courtroom in which we might confront the law *as such*. Emiliios Christodoulidis explains that, “[w]ith our attention turned to *law* the question over strategies of rupture must be thought in terms specific to the institution.” Among his interlocutors are not only theorists espousing the convivial properties of communicative reason⁴³², but also those critical legal demands placed upon the law but which do not appropriate the heart of its logic: demands for Levinasian ‘ethics,’ for example; and the very same ‘responsive dimension’ led by Peter Fitzpatrick with which we dealt in the previous chapter. Fitzpatrick explains, of course, that a constitution “must be capable of responding to the infinity of effect which Being together generates through time”⁴³³. As if against all hope for a law to come, he asks “how long can the law limp along in this modality of lack while still holding the promise of responsiveness?”⁴³⁴ before proceeding to the heart of the matter – that which frustrates the projects of ethics and the presupposition of faith in ‘openness’: for “we may exaggerate if we ignore that a certain conditioning of conditionals is at play in law, which overdetermines outcomes, that contingency is released selectively in law, its space fixed by second-order determinations – a ‘law of law’.”⁴³⁵

In the language of systems theory, law is presented here as an ‘institutional achievement’, possessed of powers of ‘homology,’ which reduces the scope of what enters into the purview of the system, and ‘deliberate deadlock’ in which “the constituent power of society yield[s] to the poverty of its constituted pathways” involving a “hedging in of constitutional conversation, the jurisdictional economy that leaves victims of injustice without standing or claim”⁴³⁶. And this, of course, is material to the question of presenting supplementary rights discourses to the logic of the laws that exclude them:

“while we have witnessed with Verges an ingenious attempt to manipulate law against its stated objectives, the effort to generalise legal strategies of rupture comes up against the limits of the ‘institutional’: institutions reduce the contingency of human interaction, they entrench models of social

⁴³² Habermas, J *Between Facts and Norms: Contributions to a discourse theory of Law and Democracy*. Trans. W. Rehg (1996) (Cambridge, Polity Press)

⁴³³ Christodoulidis, E “Strategies of Rupture,” *Law and Critique* Vol. 20(1) 3-26 (2008), 17.

⁴³⁴ *Ibid.*, 19.

⁴³⁵ *Ibid.*

⁴³⁶ *Ibid.*, 10–13.

relationships and, in that, hedge in imaginative political uses and opportunities. In all this they afford a limited language to challenge entrenchment and, with it, remove the purchase point for ‘rupture’.”⁴³⁷

This is not to suggest that rupture is not possible – but it is more difficult than Rancière’s dissensual politics suggests. Certainly, it demands “militant attention to the points of tension upon which the management of consensus and the order of representation that it serves”⁴³⁸. One commentator suggests that this conclusion is in ‘the spirit of Rancière’⁴³⁹. But surely this is only a matter of the shared political ends of such rupture? The ‘dissensus’ he envisages is less a partition of the sensible and more a Badiouian ‘fidelity to the event’⁴⁴⁰, a form of reflexivity rather than a scheme of aesthetics. And not a single mention of Rancière. Surely the identification of the problems inhering in the law, its proclivity to closure and frustration – rather than the space of the sensible in which matter appears but is not bounded by higher-order rules – becomes compounded when pitched against Rancière’s formation of dissensus? “The focus,” we are told, “needs to be on the *institutional* moment. At the point of *re-entry* of what *was* excess into what becomes actualised as opportunity in institutional solutions, institutional determinations of freedom and dignity ...”⁴⁴¹ This is not the same thing as situating a new political ontology or ‘dangerous supplement’ inside the law; but to show up the moments of ‘impossibility’ and ‘usurpation’ engendered in the law. Strategy of rupture understood in this sense is scintillating: it focuses on *moments*, events of re-entry, the point of *crossing* from the sphere of politics into the demarcated sphere of the law, or from the private into the public. As a strategy in need of a pre-existing topography, of an already-given inscription, Rancière’s approach falls short of the spatial prerequisites for bringing dissensus into the law in this way.

Nevertheless, is there another way in which we might reconcile something like Rancière’s dissensual politics, in the form of aesthetics, with the “form” of the law? Might it be possible to approach it with another understanding of those second-order rules, that ‘law of law’? If we wish to use the Law of law disruptively, and if we wish to do justice to dissensual politics – might we think of using theory? Is it possible to use the legal ‘form’ as ‘rupture’? If it is not quite a first-order strategy, it can be no *less* effective, surely, than waiting patiently for the advent of ethics and justice?

⁴³⁷ Ibid., 10.

⁴³⁸ Ibid., 25.

⁴³⁹ Bailey, R “Strategy, Rupture, Rights: Reflections on Law and Resistance in Immigration Detention.” *The Australian Feminist Law Journal* Vol. 31 (Dec 2009)

⁴⁴⁰ cf Christodoulidis, E. “Against Substitution” in Loughlin, M and Walker, N (eds) *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (2007) (Oxford, Oxford University Press).

⁴⁴¹ Christodoulidis, “Strategies of Rupture,” 21.

If Rancière's strategy rests not upon a logical confrontation of discourse but upon a distribution of the sensible, does this not bring him close to the Sophist ontology delineated in the previous chapter, in which statements did not confront each other as signifying entities, but as events, the truth of which was contained in their peculiar ontology? This is the aesthetic dimension that runs throughout the theory of the statement, and it pertains to Rancière's strategy of dissensus too. The process involved in demonstrating one distribution of the sensible on top of the other is not to appeal to the logic of that distribution: but to show it, again, beside itself, in another form. It is to place the two 'counts' into a true relationship of contradiction – rather than to bring them together under a predicative scheme in which one is determinately 'true' while the other 'false'. This is why, I think, there is an intractable dependency upon topography, upon a givenness of 'space' in Rancière's thesis that we cannot find in the fluctuating practice of law – at least not one that does not overwhelmingly defend its own boundaries with a proliferation of additional rules.

Using Legal Archaeology as a Theory for Rupture

In light of legal closure, of homology and differend, one cannot present oneself in one's 'surplus ontology' to the law in a way that asserts the rights that one has been denied. Might it be possible that the archaeological replication of the legal form can be brought to bear upon the epistemological "world" that law imagines for itself? While the law understands itself, notwithstanding its internal contradictions, as universal and replete (notwithstanding that it is institutively responsive), the institutional demonstration of a 'wrong' is made visible to the system only if it can be communicated to the system itself, in its own logic and using its own rules – wherein it ceases to be a 'wrong' as such (differend). Legal archaeology, however, allows the law its unity and closure. In fact it insists upon it, forcing the law into replete systemic parts in order to demonstrate their historical discontinuity. Presenting the law in its own terms – systemically grounded, comprised of statements that provide the structure for their own rules of formation – legal archaeology holds the *form* of the law up to itself – presenting this as an historical abstraction, an historical *a priori*. Against the vulnerable systemic positivism that eradicates power from its purview, legal archaeology relieves the charge of power by using the device of historical unity, rather than faith in the perpetuity of rules, to close off the parameters of the law. But in so doing, it shows its belonging in a sequence of similar unities; it demonstrates that the Law of law is a law of difference by demonstrating the sequential

succession of these historical unities and placing them next to each other, in their positivity, without model or copy.

It thus shows the form of the law as simulacra, depriving every instance of the law of its archetype, replicating the legal form and rendering every instance equivalent, in its lack of value, to the next. On this basis, curtailed by its history, beholden to the Law of law of the historical *a priori*, it is possible to demonstrate aesthetically the ‘wrong’ within the sphere of the law. By reducing every historical *a priori* to a law of difference, legal archaeology can superimpose one discursive unity onto another, and one system of acceptability onto another. It can demonstrate the ontological equivalence of two separate systems for the formation of utterances. It can therefore demonstrate that the law which excludes a certain category of speaker from its purview shares an ontological grounding with a secondary, albeit imagined, system in which that category of speaker is included. One is reminded again of Mendel, that “true monster” who “spoke the truth” without “being in the true”: legal archaeology allows monstrous discourses, different modalities of truth, to demonstrate the discontinuity of the legal formation and at the same time to anticipate the historical moment in which they can be otherwise, while “being in the true”.

There is a caveat, however, to the parity of law as simulacra with the politics of dissensus, insofar as Rancière does not think that the play of difference and repetition can achieve the ends of the politics of aesthetics – at least not in the context of art:

“This is what happens when art exhibitions present us with mere re-duplications of objects of consumption and commercial videos, labelling them as such, on the assumption that these artefacts offer a radical critique of commodification by the very fact that they are the exact re-duplication of commodities. This indiscernibility turns out to be the indiscernibility of critical discourse, doomed either to participate in the labelling or to denounce it ad infinitum, asserting that the sensorium of art and the sensorium of everyday life are nothing more than the eternal reproduction of the ‘spectacle’ in which domination is both mirrored and denied”⁴⁴²

But it is precisely the form of the law, insofar as it infinitely brings itself into being, adapting to what it encounters and what threatens to overcome it, that leaves us doomed to repetition. An element of coercion is involved: we have no choice but to demonstrate that what presents itself as continuous and universal is in fact so many instances of simulacra without archetype. The pragmatic and strategic limitations of the approach are, of course, evident. Legal institutions are very real, and do not admit of history lessons, in principle. Nevertheless, legal archaeology may,

⁴⁴² “The Aesthetic Revolution and its Outcomes” in Rancière, J, *Dissensus*, supra. n. 417, 128.

for a start, inform the way that we teach the law, construct legal critique and think about its history. Such were the objectives of the CLS movement: they might be acceptable still.

But there is another advantage, I think, to be found within the method, one which enables us to respond to Rancière's disqualification of Agamben's 'depoliticised' theory on biopolitics and sovereign power in renewed terms. For legal archaeology can be brought to bear against Agamben, to wrest biopolitics from the grip of *oikonomia*. The zone of indistinction threatens infinitely, for Agamben, because sovereign right is articulated into biopolitical practices, themselves bound up with apparatuses of knowledge, themselves admitting (if Agamben is a Foucaultian proper) of systems of acceptability within which they operate. To introduce the historical *a priori* is to counter the presentation of the "Law of law" as a *mythologeme*, a "mythical signature" that covers over the void at the limit of power⁴⁴³. A legal archaeology is a complete inversion of Agamben's formulation. Instead of understanding the proliferation of practices of government as the demonstration of an absence of transcendental Law, or a "Law of law", legal archaeology forces a "Law of law" onto every governmental instance, carving out its history and demonstrating the law of its contingency. If Agamben's thesis is concerned with the proliferation of executive power without sovereign authority from the point of view that knowledge and power are capable of standing in distinct relationships, legal archaeology allows for the systematisation of that power. The question of the 'imperative without emperor' "brings up the notion of a power that cannot be justified or defined (or even spotted), but that yet stands in effective use (that of crisis-management as ultimate government), and that coexists purely externally with its opposite; a power that appears (in the media as earlier in the churches) but that cannot be used"⁴⁴⁴. Against this, it is precisely the systems of acceptability under which governmental power operates that come into view, systems that can be broken down and detailed as to their conditions of existence but simultaneously understood for their historically contingent intractability. In contradistinction to a sovereign being 'in force without significance', biopolitics now admits of an abundance of law. Instead of reinstituting an 'emperor', however, the historical *a priori* refers to no transcendental predicate, instead configuring its possibility on an excess of knowledge that is nevertheless articulated alongside power, which allows us to imagine 'being otherwise'. A far less onerous venture than attempting to occasion a 'form of life': from the vantage point of legal archaeology, is not problematic that Agamben speaks from the vantage point of the law, but that he does not speak about law *enough*.

⁴⁴³ Zartaloudis, *Giorgio Agamben*, supra. n. 91, 12.

⁴⁴⁴ Schütz, A "Imperatives Without Emperor," *Law and Critique* Vol. 20(3) (2009) 233-243, at 242.

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